

Decision **DRAFT DECISION OF ALJ THORSON** (Mailed 2/27/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to implement the provisions of
Public Utilities Code § 761.3 enacted by
Chapter 19 of the 2001-02 Second Extraordinary
Legislative Session.

Rulemaking 02-11-039
(Filed November 21, 2002)

**DECISION ADOPTING GENERAL ORDER
IMPLEMENTING AND ENFORCING ELECTRIC
GENERATOR GENERAL DUTY STANDARDS FOR OPERATION AND
MAINTENANCE, MAINTENANCE STANDARDS, AND
CAISO'S OUTAGE COORDINATION PROTOCOL**

TABLE OF CONTENTS

Title	Page
DECISION ADOPTING GENERAL ORDER IMPLEMENTING AND ENFORCING ELECTRIC GENERATOR GENERAL DUTY STANDARDS FOR OPERATION AND MAINTENANCE, MAINTENANCE STANDARDS, AND CAISO'S OUTAGE COORDINATION PROTOCOL	1
A. Background.....	3
B. Procedural History.....	5
C. Commission Jurisdiction.....	6
D. Implementation and Enforcement Approach.....	10
E. Participants' Major Concerns	12
1. General Concerns.....	12
a. Delegation of Functions to Staff.....	12
b. Procedures to Implement Standards.....	14
c. Enforcement Procedures.....	15
d. Potential Conflict with Other Authorities	16
e. Interference with FERC/CAISO Authority.....	16
f. Incorporation in Tariff.....	17
g. Amendments to Standards.....	20
2. General Duty Standards.....	22
a. Enforceability.....	22
b. Relationship with Existing Rules.....	24
c. Authority to Adopt, Implement and Enforce General Duty Standards	25
3. Maintenance Standards.....	26
a. Status of Appendix A to Standards.....	26
b. Unique Characteristics of Generating Assets	26
c. Overlap with Other Requirements.....	27
d. Relationship to Commission's Ratemaking and Regulatory Functions	28
F. CEQA Compliance.....	29
G. Comments on Draft Decision	30
H. Assignment of Proceeding.....	37
Findings of Fact	37
Conclusions of Law	39
ORDER	40

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We adopt a General Order (GO) providing rules for the implementation and enforcement of (1) General Duty Standards for operation and maintenance and (2) more detailed standards for the maintenance of facilities for the generation of electric energy owned by an electrical corporation or located in the State of California. By adopting the GO, set forth as Attachment A to this decision, we also enforce the Outage Coordination Protocol adopted by the California Independent System Operation (CAISO). We issue the GO in response to legislation enacted by the California Legislature in 2002, now codified at Pub. Util. Code § 761.3.

While the General Duty and Maintenance Standards themselves were developed and adopted by the California Electricity Generation Facilities Standards Committee¹ ("Standards Committee" or "Committee"), the California Legislature has directed us to enforce and implement these provisions. Similarly, while CAISO has developed and adopted the Outage Coordination Protocol, the Legislature has also required that we enforce the Protocol. Our implementation and enforcement of the General Duty Standards, Maintenance Standards, and Protocol will help ensure the reliable operation of Generating Assets subject to our authority and provide for public health and safety.

¹ The Standards Committee consists of three members: a member of the California Public Utilities Commission, appointed by the Commission; a member of the California Independent System Operator board, appointed by that board; and a third member (with electric generation expertise) jointly appointed by the Commission and the ISO board. The Standards Committee adopts and may revise standards for the maintenance and operation of electric energy generation facilities located in the state.

We intend that this GO will be the basic framework for implementing and enforcing all standards and amendments adopted by the Standards Committee including logbook, maintenance, and operational standards. As a result of today's decision, the General Duty Standards and Maintenance Standards, as well as the generators' obligations under the CAISO Protocol, become enforceable through the GO. After other requirements and standards are adopted by the Committee, filed with us, and formally acted upon by us, we intend that these other requirements and standards will be appended to the GO and thereafter implemented and enforced by the Commission. Once this proceeding is concluded, the GO will codify all standards and requirements applicable to facilities used for the generation of electric energy (pursuant to Pub. Util. Code § 761.3)² and set forth the procedures to be used for implementation and enforcement.

A. Background

The statewide energy crisis of 2000-2001 resulted in many economic and personal hardships to people and businesses within California. In our recent filing with the Federal Energy Regulatory Commission (FERC), we indicated that the total cost of electricity needed to serve California, for the period of May 2000 through June 2001, was \$19 billion higher than the cost incurred during the combined years of 1998, 1999, and 2000. Our filings with FERC document many instances of Generating Assets being placed on reserve status for questionable reasons and resulting in electricity power outages.³

² Statutory references are to the Pub. Util. Code, unless otherwise noted.

³ See California Parties' Supplemental Evidence of Market Manipulation by Sellers, Proposed Findings of Fact, and Request for Refunds and Other Relief, San Diego Gas &

In 2002, the California Legislature passed Senate Bill SBX2 39 during its second extraordinary session to help avoid such outages in the future. The Legislature determined that the public interest, as well as the public health and safety, requires the electric generating facilities and power plants in the state to be maintained appropriately and operated efficiently.

We commenced this rulemaking proceeding to address our obligations under the legislation, now codified at Pub. Util. Code § 761.3. Under the statute, we worked with CAISO to create the Standards Committee. As contemplated by the legislation, both our staff and that of CAISO provide administrative assistance to the Standards Committee. The Standards Committee is responsible for adopting standards for the maintenance and operation of facilities that generate electric energy for use or compensation within the state. The Standards Committee has adopted Logbook Standards for Thermal Powerplants (Thermal Logbook Standards) (filed with us on April 2, 2003), Maintenance Standards for Generators with Suggested Implementation and Enforcement Model (Maintenance Standards)(filed with us on May 16, 2003), and Revised General Duty Standards for Operation and Maintenance (General Duty Standards) (filed with us on June 6, 2003). The CAISO has previously adopted the Outage Coordination Protocol (Protocol).⁴

Our decision today and the accompanying GO address the implementation and enforcement of the General Duty and Maintenance Standards, as well as the enforcement of the CAISO Protocol. We are

Elec. Co. v. Sellers of Energy & Ancillary Serv., No. EL00-95-000 *et seq.* (FERC Mar. 3, 2003).

⁴ CAISO, FERC Electric Tariff, Sheets 509-35 (Oct. 8, 2003).

contemporaneously considering a draft decision to enforce the Thermal Logbook Standards. Once we have finalized the logbook decision, the operative provisions of that decision will be included in the GO we adopt today.

In the next few months, we anticipate that the Committee will adopt operational standards and logbook standards for hydroelectric generation facilities. Once these operational and hydroelectric logbook standards are filed with us, we also will decide how they will be implemented and enforced. We intend to incorporate these operational and hydroelectric logbook standards into today's GO and use the GO to implement and enforce these standards.

B. Procedural History

We issued this Order Instituting Rulemaking (OIR) to address our responsibilities under one section of SBX2 39, the newly added Pub. Util. Code § 761.3. The OIR provides additional information on the scope of the proceeding, the Committee and its work, and the Commission's relationship to the Committee. A Prehearing Conference (PHC) was held on February 10, 2003. The resulting scoping memo divided the proceeding into three phases: Phase 1, standards for maintenance; Phase 2, logbook standards and Outage Coordination Protocol enforcement; and Phase 3, operational standards, private generator agreements, and ensuring that facilities remain available and operational.⁵ Subsequently, on May 2, 2003, Phase 4 was added to the proceeding, concerning the implementation and enforcement of General Duty Standards.⁶ Today's decision completes Phases 1 and 4 of this proceeding, and also completes those

⁵ Scoping Memo and Ruling of Assigned Commissioner at 2 (Feb. 19, 2003).

⁶ Assigned Commissioner's Ruling Amending Scoping Memo (May 2, 2003).

parts of Phase 2 pertaining to the enforcement of Thermal Logbook Standards and CAISO's Protocol.

The parties to this proceeding were provided several opportunities to file PHC statements and comments on the methods to implement and enforce the Maintenance Standards. Our Consumer Protection and Safety Division (CPSD) also filed comments describing how it proposes to enforce the Maintenance Standards. Administrative Law Judge (ALJ) John E. Thorson then conducted a workshop affording the parties and CPSD an opportunity to respond to questions raised by the comments and replies. The ALJ also provided the parties an additional opportunity to describe how the Maintenance Standards could be enforced cooperatively with CAISO, utilizing that entity's FERC tariff.

The parties were also provided opportunities to file comments and replies on the implementation and enforcement of the General Duty Standards and the Thermal Logbook Standards. The proposed GO, specifying how the General duty standards, Maintenance Standards, and outage coordination protocol would be enforced, was distributed in draft form pursuant to an ALJ Ruling dated October 2, 2003; and the participants filed an additional round of comments and replies.

C. Commission Jurisdiction

Our enforcement jurisdiction under section 761.3 has been the most controversial aspect of this proceeding. The breadth of the legislation extends our authority to many electric generators who have consistently maintained that they are not otherwise subject to our regulation. Most of the jurisdictional

questions have been addressed in our decision on Thermal Logbook Standards.⁷ Rather than repeat our commentary and conclusions on jurisdictional questions, we incorporate by reference our more detailed discussion set forth in that decision.

One jurisdictional question does require further discussion here, that is, our authority to enforce these standards on hydroelectric Generating Assets owned by investor-owned utilities.

Two California-based utilities, Southern California Edison (SCE) and Pacific Gas & Electric Co (PG&E), own hydroelectric facilities. SCE owns thirty-six hydroelectric generating plants consisting of seventy-nine generating units. SCE indicates that most of these operate under FERC licenses. PG&E reports owning sixty-six hydroelectric powerhouses that are licensed by FERC and three non-FERC facilities.

Since they are owned by SCE and PG&E, we have undisputed authority to impose these standards on non-FERC hydroelectric facilities located within California. The more difficult question is whether we have the authority to impose the standards on FERC-licensed hydroelectric facilities.

With some exceptions, FERC has authority over the construction, operation, and maintenance of hydroelectric generation facilities. These facilities on navigable waterways are licensed by FERC under section 4 of the Federal Water Power Act.⁸ The licenses are issued on the condition that specific

⁷ Interim Opinion Regarding Commission Implementation and Enforcement of Logbook Standards for Thermal Powerplants, Agenda Item No. 2936 (circulated Oct. 29, 2003).

⁸ 16 U.S.C. § 797 (2003).

maintenance and operational requirements be performed,⁹ and FERC has issued rules on maintenance and operational requirements.¹⁰

These licenses are also issued on the further condition, set forth in section 19 of the Federal Water Power Act, that the licensee “shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power . . . as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered”¹¹ This section is part of an overall federal statutory scheme that embodies substantial deference to state authority. FERC, formerly the Federal Power Commission, regulates hydroelectric services and sales to consumers only if a state commission has not been established. Under section 20,¹² the federal agency regulates the interstate movement of hydroelectric power only when the states directly concerned fail to agree through a properly constituted joint authority (such as an interstate compact commission) on the services to be rendered or the rates to be charged. As the U.S. Court of Appeals has indicated, under the Federal Water Power Act, regulation of hydroelectric power “is to be encompassed through state authority and not through the power of the Federal government unless the state has failed

⁹ *Id.* § 803(c).

¹⁰ *See, e.g.*, 18 C.F.R. § 12.4 (Office of Hydropower Licensing inspection authority), § 12.5 (responsibility of licensee concerning maintenance of water power project), § 12.12 (records concerning maintenance and operational practices) (2003).

¹¹ 16 U.S.C. § 812.

¹² *Id.* at § 813.

to set up a regulatory commission. Only in the event of such failure does the Federal Power Commission possess jurisdiction to regulate rates and services.”¹³

This statutory framework authorizes the Standards Committee to apply, as it has done, its General Duty and Maintenance Standards to hydroelectric facilities within California, whether or not they are licensed by FERC. Since these standards are designed to ensure electric system reliability and adequacy, they affect the electrical service to be provided to California consumers. Given this purpose, California’s strong local interest outweighs any minor or indirect interference with interstate commerce.¹⁴

While section 19 also provides us with authority to enforce these General Duty and Maintenance Standards, we are aware that FERC has an ongoing and beneficial maintenance and safety program for federally licensed hydroelectric facilities. Since the State of California has not previously regulated the operations and maintenance at California-based hydroelectric facilities, we do not now seek to displace FERC’s activities at these facilities, as is contemplated by section 19 of the Federal Water Power Act. Rather, we invite a cooperative relationship with FERC, based on intergovernmental comity, allowing the joint expertise of both commissions to be utilized in securing the safe, efficient, and reliable operation of these facilities. For the moment, we have exempted FERC-licensed hydroelectric Generating Assets from sections 7.0, 9.0, 10.3, 10.4, and 15.1 of the GO. Hydroelectric Generating Assets not licensed by FERC, however, are subject to all applicable provisions of the GO.

¹³ Safe Harbor Water Power Corp. v. Federal Power Comm’n, 124 F.2d 800, 805 (3d Cir. 1941).

¹⁴ East Ohio Gas Co. v. Tax Comm’n of Ohio, 283 U.S. 465, 472 (1931).

Based on the foregoing analysis, as well as the analysis set forth in our decision on Thermal Logbook Standards, we use the term “Generating Asset” in this decision and the accompanying GO to refer to those generating facilities over which we assert our jurisdiction pursuant to Pub. Util. Code § 761.3. In addition to the FERC-licensed hydroelectric facilities discussed above, we have exempted facilities where the total nameplate rating generating capacity at that plant or location is less than 50 megawatts (MW) from certain requirements of the GO. Also, we specifically authorize our Executive Director, pursuant to Pub. Util. Code § 308, to exempt other categories of facilities based on objective criteria (*i.e.*, vintage, technology, generating (megawatt) capacity, or ownership) to best utilize the Commission’s limited resources while maximizing the program’s benefits of improving electric service reliability and adequacy.

Several of the comments suggest a procedure for generators to learn from the Commission whether the GO covers them. Our jurisdictional discussion, both in this decision and the Thermal Logbook decision, identifies the major categories of Generating Assets that are subject to the GO. That discussion, section 761.3, and the GO itself all adequately explain jurisdiction and the facilities that are covered. No party proposes the specifics of such an advisory function, and we are not persuaded to assume the additional administrative burden of developing and implementing a procedure for unit- or case-specific determinations.

D. Implementation and Enforcement Approach

The GO both implements and enforces the standards adopted pursuant to section 761.3. The GO’s implementing provisions set forth the facilities and persons covered by the GO (section 2.0 plus other specific exemption provisions),

the standards that must be satisfied (sections 3.0 to 9.0), provisions for monitoring whether generators are in compliance with the various standards (sections 10.0 and 11.0), and certain miscellaneous matters such as the confidentiality of information (section 15.0). The GO's enforcement provisions set forth the procedures and sanctions that will be used by the Commission to remedy violations of the GO (sections 12.0 to 14.0).

The monitoring provisions rely chiefly on (a) self-reporting by generators who must submit compliance documents and certifications indicating they are in compliance with applicable standards; (b) Commission monitoring, by CPSD, of generator data submitted to the CAISO, other governmental agencies, and the North American Electric Reliability Council (NERC); (c) information and document requests; and (d) CPSD on-site audits, investigations, tests, and inspections of Generating Assets.

The GO provides detailed procedures for sanctioning violations of the GO. Most of these provisions follow existing Commission enforcement practices. In order to expeditiously resolve minor violations or violations where the facts are not reasonably in dispute, the GO provides a voluntary opportunity for generators to accept a specified fine for the violation.

In their comments, some generators have criticized the GO as imposing a "strict liability" approach to enforcement. "Strict liability" is a tort concept, meaning "liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe,"¹⁵ and is not commonly used to describe administrative enforcement. The GO does require adherence to the standards and other obligations set forth therein, and

¹⁵ BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

this obligation exists whether or not the generator intended a violation or was negligent or reckless. This approach is consistent with our prior general orders. The GO provides that sanctions for violations may be enhanced or mitigated depending on the factual circumstances surrounding the violation.

Finally, the GO sets forth detailed procedures for generators to claim confidentiality for documents or other information.

E. Participants' Major Concerns

We received comments and replies on numerous topics from participants during the various phases of this rulemaking proceeding, as described in Part A, "Background." During each phase, the participants were afforded an opportunity to file comments and replies. The parties raised general concerns, as well as more specific criticisms and recommendations addressed to particular provisions of the GO.

In this section, we address the parties' major concerns, starting with comments that apply to our implementation and enforcement of the standards adopted pursuant to section 761.3 and continuing with responses concerning the General Duty Standards and the Maintenance Standards. Our commentary here is in addition to the jurisdictional issues we have previously discussed in our Thermal Logbook Standards decision and those we address in Part C of this decision. In Attachment B, we include a more detailed, section-by-section response to the many other comments made on the draft GO.

1. General Concerns

a. Delegation of Functions to Staff

Several generators objected to what they believe is an impermissible delegation of Commission authority to its staff. They suggested that an unlawful delegation results in two main areas of the GO: (a) provisions allowing the

Executive Director to exempt certain Generating Assets from certification and other requirements concerning the standards and requirements; and (b) staff imposition of scheduled fines.

We have considered the delegation of authority issue in many of our past decisions. The most recent, thorough discussion of the issue, in the context of staff suspension of advice letters, was set forth in our order denying rehearing in *In re California Association of Competitive Telecommunication Companies*.¹⁶ There we concluded that the Public Utilities Code authorizes the delegation to staff “of responsibilities that involve the exercise of actual judgment and discretion, and not simply the application of a rubber stamp or mathematical formula.” Specifically, the Executive Director and staff are authorized under Pub. Util. Code § 308(b) to perform “such other duties as the president, or a vote of the commission prescribes.”

When we authorize the Executive Director to exempt certain Generating Assets from logbook or maintenance certification requirements, we specify objective criteria for staff to use in making that determination (*i.e.*, vintage, technology, generation (megawatt) capacity, ownership). In response to comments, we have eliminated language that would interject uncertainty as to the objective criteria to be used by the Executive Director (*i.e.*, “including but not limited to”). With this minor modification, we have sufficiently circumscribed the Executive Director’s role in establishing exemption categories. We provide this authority because we believe as staff proceeds to implement this program, the Executive Director can carefully calibrate, by establishing exemptions, how

¹⁶ D.02-02-049; 2002 Cal. PUC LEXIS 162, at *5 (2002).

best to use the agency's limited resources while maximizing the program's benefits of improving electric service reliability and adequacy.

We also disagree that authorizing staff to apply scheduled fines for specified violations constitutes an unlawful delegation of Commission authority. The GO includes these scheduled fine provisions to allow prompt resolution of specified violations where facts are not in dispute. We previously have favorably described this approach as a "traffic ticket" or ministerial citation process.¹⁷ While the GO allows staff to assess the specified fine, the fine will not actually be imposed if the generator disagrees. In that case, staff must either drop the matter or proceed with other traditional methods of enforcement, such as an Order Instituting Investigation (OII) or other formal Commission proceeding. In short, scheduled fines can only be imposed when the generator consents. We see no delegation problem here.

While we intend to coordinate and cooperate with local, state and federal agencies to the fullest extent necessary and reasonable, at the same time we must implement and enforce Committee-adopted Operations and Maintenance Standards, as directed by the Legislature, and we will do so.

b. Procedures to Implement Standards

We asked for suggestions about procedures other than traditional methods to assist in the implementation of the standards. These methods could include training sessions or web-based materials, among others. We received very few suggestions concerning such approaches. One entity suggested that implementation of the standards might be incorporated into performance-based

¹⁷ *In re* Rules for Enforcement of Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates, D.98-12-075, 84 CPUC2d 155 (1998).

ratemaking. Several participants asked for a stakeholder advisory committee. Others asked for informal opportunities to meet and confer with CPSD in preparing certifications and in discussing apparent violations.

Few specific comments were offered on new or non-traditional implementation methods. We do not believe that we should vary our general approach to the implementation of these standards and requirements. This includes appropriate staff training, ongoing communication with the regulated community, monitoring of generator compliance, information requests, audits and inspections, and other activities. CPSD has worked over the last year to hire and train new staff and otherwise prepare for the implementation of this new program.

We are also not persuaded to create a stakeholder committee or a meet-and-confer process, as several generators have suggested. The resources of parties and the Commission are not without limit, and there are many important uses for those limited resources. A stakeholder committee might be of assistance, but its need is not persuasively demonstrated. This does not preclude staff, respondents and parties from meeting when and as necessary, appropriate and reasonable. We simply decline at this time to order the creation of a stakeholder committee with duties and obligations that might unreasonably burden those with limited resources. We will reconsider creating such a committee if and when a specific need is evident, and its cost-effectiveness can be evaluated. More generally, as this program is implemented, we encourage generators to suggest ways in which it may be improved.

c. Enforcement Procedures

Several comments raised concerns about who would file complaints under the standards, the role of Commission staff, the nature of the enforcement

proceedings, and the burden of proof. We have addressed all these concerns in detail in the GO. Under the GO, CPSD will have the primary role for implementing and enforcing the requirements although we do not foreclose, at this time, the possibility that other persons may file complaints asserting violations of the GO. As for staff enforcement, we have set forth a graduated process that proceeds from self-certification, to audits and inspections, and ultimately to evidentiary hearings and the possible imposition of sanctions.

d. Potential Conflict with Other Authorities

Duke Energy North America (DENA) and others are concerned that the Commission will develop an implementation and enforcement program that will duplicate or conflict with the programs of local, state and federal authorities, or existing contracts. DENA concluded that creation of a duplicative and potentially conflicting regulatory structure will be exceedingly wasteful of the Commission's limited resources, as well as the resources of other agencies and stakeholders.

We agree that limited resources must be carefully allocated. The Legislature adopted section 761.3, however, because of concerns about the stability, reliability and adequacy of California's electricity system, as well as the public's health and safety. If the existing local, state and federal regulatory structure were satisfactory to the Legislature, section 761.3 would simply have been unnecessary.

e. Interference with FERC/CAISO Authority

In our Thermal Logbook Standards decision, we have discussed at length the relationship of our authority to implement and enforce standards with FERC's jurisdiction under federal law. As we said in our earlier decision, "FERC's jurisdiction does not extend to . . . operation and maintenance standards

of ‘facilities used for the generation of electric energy.’ These are precisely the standards and Generating Assets subject to this rulemaking proceeding.”¹⁸

Some of the parties have commented that our enforcement of CAISO’s Outage Coordination Protocol, which is part of CAISO’s federal tariff, interferes with FERC’s authority. One party suggested that our required adherence to CAISO’s Protocol unlawfully expands CAISO’s jurisdiction over entities not otherwise subject to its authority.

As a matter of state law, the Legislature has directed us to “enforce the protocols for the scheduling of power plant outages of the Independent System Operator.”¹⁹ Both the Commission and CAISO are creations of state law, and the Legislature can lawfully coordinate the activities of both entities.

Our objective in enforcing CAISO’s Protocol is to ensure the proper operation and maintenance of electric generating facilities, a responsibility reserved to us under federal law. FERC may also enforce the Protocol since its provisions are part of the federally filed tariff, but FERC’s purpose in doing so is to regulate the transmission of electricity and the wholesale power market. Given these different purposes, both the state and federal commissions, we believe, may enforce the Outage Coordination Protocol.

f. Incorporation in Tariff

Most comments suggested that we enforce the standards by obtaining their incorporation in the tariff filed by CAISO with FERC. These comments indicated this approach is the only feasible way to avoid jurisdictional

¹⁸ Interim Opinion Regarding Commission Implementation and Enforcement of Logbook Standards for Thermal Powerplants at 15 (Draft Decision filed Oct. 29, 2003) (citations omitted).

¹⁹ Pub. Util. Code § 761.3(a).

uncertainties about the Commission's authority over certain generators, principally the Exempt Wholesale Generators (EWGs). These comments, however, initially provided few details on how this "enforcement-by-incorporation" arrangement would work. The ALJ invited more information on this suggestion, and AES Generators, DENA, and West Coast Power submitted more specific proposals. We summarize their suggestions and then provide our own observations on the "enforcement-by-incorporation" possibility.

1) Generators' Proposals

AES Generators (AES) used a flow chart to illustrate how the Maintenance Standards (and presumably other standards) might be enforced through incorporation in the CAISO tariff and the joint efforts of our staff and that of CAISO.²⁰ The Maintenance Standards could be incorporated as a protocol or an appendix to Participating Generator Agreements (PGAs), those contracts allowing generators to schedule their power with CAISO. Our staff filing a formal complaint with FERC, to be heard and decided by that agency, could ultimately enforce violations of the standards. Many of the other steps in AES's proposal parallel the self-certification, audit, and inspection procedures we adopt in the GO.

DENA's proposal was similar.²¹ It suggested that an appropriate section in CAISO's tariff be used to describe the enforcement procedures and that the Maintenance Standards themselves be incorporated into a new protocol to the tariff. DENA also recommended the use of the existing detailed dispute resolution process that is already part of the CAISO tariff. The revised tariff and

²⁰ AES Generators' Proposal (Mar. 26, 2003).

²¹ Comments of Duke Energy North America on Phase 1 Issues (Mar. 26, 2003).

new protocol would be submitted to FERC for its approval. DENA also indicated that, ultimately, sanctions would be imposed by FERC although DENA expected most problems to be resolved through less formal processes.

West Coast Power's proposal differed mainly in its suggestion that the generators' self-certifications be filed with CAISO and in its emphasis on the Commission's role "as the eyes and ears of the implementation and enforcement process, . . ." ²² Once again, enforcement would be through a complaint filed with FERC, with the caveat that the Commission avoid adjudicating complaints against generators over whom West Coast Power believes we do not have jurisdiction.

2) Our Observations

As described by these generators, CAISO's FERC-approved tariff applies to generators who market power through the ISO-controlled electrical grid. Each generator marketing electricity through CAISO executes a PGA that serves as the basic contractual arrangement and requires the generator "to comply with all applicable provisions of the ISO Tariff." If the Maintenance Standards were incorporated into the CAISO tariff or the PGAs, they would be binding on all generators marketing power through CAISO, even on those EWGs who maintain they are beyond our jurisdiction.

Such an approach is not unique since the CAISO tariff already includes many conditions and restraints on participating generators. The CAISO Board of Directors also has adopted the "ISO Enforcement Protocol" that has

²² Comments of West Coast Power in Response to the Administrative Law Judge's Ruling of March 21, 2003 at 7 (Mar. 26, 2003).

been filed with FERC, although it was stayed by FERC shortly after filing.²³ The Enforcement Protocol includes “market rules” that proscribe certain generator behaviors interfering with the reliable operation of the transmission grid and the fair and competitive operation of markets.²⁴

We believe a useful regulatory arrangement could be crafted, using the CAISO tariff and Enforcement Protocol (assuming FERC approval), and PGAs to “backstop” our own enforcement of the Committee’s standards through the GO. We believe enforcement in this manner, as a supplement to our own procedures, could be an especially strong incentive for responsible maintenance and operational practices. Such an arrangement would require close cooperation with CAISO, however, and is beyond the scope of this rulemaking proceeding. Nevertheless, we ask our Executive Director to investigate this possibility in greater detail, once the CAISO Enforcement Protocol becomes effective, and submit recommendations to us within 180 days.

g. Amendments to Standards

Some comments suggested that the standards would no longer be effective after the Standards Committee itself dissolves under SBX2 39, now scheduled for January 1, 2005.²⁵ We reject this interpretation. This “sunset” date applies only to the subsection of SBX2 39 pertaining to the Standards Committee. The “sunset” provision does not pertain to the standards themselves.

²³ Order Accepting and Suspending Tariff Amendment, 104 FERC ¶ 61,308 (Sept. 22, 2003) (stay of Amendment No. 55 to Open Access Transmission Tariff until Feb. 21, 2004).

²⁴ CAISO, ISO Enforcement Protocol EP 1.1, Amendment No. 55 to Open Access Transmission Tariff (July 22, 2003), *accepted & suspended*, 104 FERC ¶ 61,308 (Sept. 22, 2003).

²⁵ Pub. Util. Code § 761.3(b)(3).

Other comments have asked how amendments to the standards will be incorporated into the Commission's ongoing implementation and enforcement program. While the Standards Committee is in existence, it has authority to revise the standards.²⁶ The GO specifies that if the Committee, during its existence, duly adopts and files amendments to the standards with the Commission, we will enforce those amended standards under the GO, as we have discussed in this decision.

Some comments suggested that, once the Committee terminates, the standards cannot be amended and will soon become obsolete and unenforceable in any reasonable fashion. We also reject this narrow interpretation of the legislation for two reasons.

First, the adopted standards involve reasonably stable criteria that are both of a general and specific nature. For example, the GDS are six standards that are likely to be reasonable standards no matter the other conditions or energy market structure in California (e.g., operation and maintenance that protects public health and safety, promotes availability and reliability, ensures maintenance of reasonable operation and maintenance records). Similarly, the Maintenance Standards are crafted as eighteen broad performance objectives that are unlikely to change with time (e.g., the first maintenance standard concerns safety, an enduring concern).

Second, under SBX2 39, the Committee was created in order to access the collective experience and insights of a Commissioner, a representative of the CAISO Board of Directors, and a third person with electric generating expertise in the drafting of the initial standards. Once those standards have been

²⁶ *Id.* § 761.3(b)(1).

initially adopted, the Committee's work is done and the entity will be disbanded, pursuant to statute. We do not believe, however, that the Legislature authorized and funded a major new regulatory program only to have the detailed requirements under the broad performance objectives become unworkable over time. We do believe that the Legislature intended and directed a continuing implementation and enforcement program.

The Commission has a continuing obligation under section 761.3(a) to implement and enforce the standards. Necessarily, our continuing enforcement obligation, by implication, provides us authority to modify and update the specific requirements under the eighteen broad performance objectives, so long as the changes remain consistent with those broad objectives. In conclusion, we believe the Commission has the authority, after the Committee dissolves, to amend the standards as required.

2. General Duty Standards

a. Enforceability

Several parties asserted that the General Duty Standards are too broad and vague to be enforced. These parties contend that the Commission should not implement and enforce the General Duty Standards, but should rely on the more specific and detailed Maintenance Standards (now adopted) and operations standards (to be adopted). We are not persuaded.

The General Duty Standards complement more specific standards that have been and will be adopted. To the extent a requirement is imposed by a more specific standard, compliance with the specific standard satisfies compliance with the general standard. This is a reasonable approach to

implementation and enforcement.²⁷ Consistent with this approach, specific standards control where the Committee has adopted specific standards (*e.g.*, logbook standards for thermal power plants) and they are being implemented and enforced by the Commission (*e.g.*, units of 50 MW and larger). The general standards control, however, where specific standards have not been adopted, implemented and enforced (*e.g.*, logbooks for thermal power plants less than 50 MW and logbooks for all non-thermal power plants).

We reject the proposition that the Committee must adopt, and the Commission must implement and enforce, only detailed, specific, and itemized standards. Some of the comments support our view, as when DENA said the General Duty Standards establish “standards of appropriate generality and that are also consistent with DENA’s long-standing operation and maintenance practices.”²⁸

For example, the Committee acted reasonably to adopt a broad standard requiring covered facilities to maintain logbooks consistent with prudent industry practice. No party asserted that facilities fail to keep records (logbooks) of operation and maintenance or that no industry practice exists. The Commission also acts reasonably in choosing, as we have, to implement and enforce this and the other General Duty Standards under the GO.

Parties at the same time criticized the General Duty Standards as being too vague and the other standards (*e.g.*, logbook, maintenance) as being too specific. The Committee has sought an appropriate balance of broad and specific

²⁷ See Committee Resolution No. 3 (June 3, 2003).

²⁸ DENA Comments at 2-3 (May 12, 2003); DENA Comments at 1 (June 20, 2003) (incorporating May 12, 2003, Comments).

standards, and the Commission will similarly implement and enforce broad and specific standards. We decline to abandon implementation and enforcement of general standards because of complaints that they are too general or too specific. The result would be a failure to implement or enforce any standards.

b. Relationship with Existing Rules

DENA stated, “[T]he General Duty Standards makes clear that it is not intended to override *any* existing rules, permits or other regulations related to generation facilities.”²⁹ DENA concluded that nothing remains for, and the Commission should refrain from, any implementation or enforcement. In support, DENA cited the following Committee statement:

Pursuant to the provisions of California Public Utilities Code § 761.3(f), nothing in these General Duty Standards for Operations and Maintenance shall modify, delay, or abrogate any deadline, standard, rule or regulation that is adopted by a federal, state, or local agency for the purposes of protecting public health or the environment, including, but not limited to, any requirements imposed by the California State Air Resources Board, an air pollution control district, or an air quality management district pursuant to Division 26 (commencing with section 39000) of the California Health and Safety Code.³⁰

We disagree with the suggestion that the General Duty Standards should not be implemented and enforced by the Commission. The Committee’s citation is taken directly from the law, and is with respect to “any deadline, standard, rule or regulation that is adopted by a federal state or local agency *for*

²⁹ DENA Comments p. 2 (June 20, 2003) (emphasis added).

³⁰ Committee Resolution No. 3 at Att. A, p. 2 (June 3, 2003).

the purposes of protecting public health or the environment.”³¹ This language, concerning health or environmental rules, does not preclude the Commission from imposing other “existing rules, permits or other regulations related to generation facilities.”

c. Authority to Adopt, Implement and Enforce General Duty Standards

Mirant and others claimed that the Committee has exceeded its authority in adopting the General Duty Standards, and the Commission may not implement and enforce standards that the Committee may not lawfully adopt. We are not persuaded.

As an example, Mirant and others argued that the Committee may not adopt outage coordination protocols (*i.e.*, General Duty Standard 3). To the contrary, outage coordination is a crucial element of operations and maintenance. In fact, each of the General Duty Standards is limited to operations and maintenance of electric generation facilities. The Committee has properly adopted them, and the Commission is not only permitted but is required to provide for their implementation and enforcement.

Mirant also claimed that the General Duty Standards are not “standards” but descriptions of honorific conduct (*e.g.*, to be available, to operate). To the contrary, General Duty Standard 2, for example, requires that “each facility be operated and maintained so as to reasonably available” This General Duty Standard is an operation and maintenance requirement designed to meet the state’s vital goals (*e.g.*, reliability, stability, adequacy), not a generalized admonition to be “available.” Similarly, each of the other General

³¹ Pub. Util. Code § 761.3(f) (emphasis added).

Duty Standards is an operations and maintenance standard designed to meet the state's goals for its electricity system.

3. Maintenance Standards

a. Status of Appendix A to Standards

When the Committee first adopted the Maintenance Standards, the Standards included an Appendix A, "Maintenance Guidelines for Electric Generating Facilities." Many of the early comments in this proceeding urged us to specify that these guidelines are not binding requirements on Generating Asset Owners.

The Committee itself has addressed this concern. In its Resolution No. 2, dated May 2, 2003, the Committee clarified that the "Maintenance Guidelines for Electric Generating Facilities" are not meant to be enforceable standards.³² In subsection 2.13, the GO utilizes the Committee's limited definition of "Generator Maintenance Standards."

b. Unique Characteristics of Generating Assets

Many of the comments emphasized the unique characteristics of individual Generating Assets. These distinctive features result from differences in technologies, age, and other factors. The comments urged that we not apply a "one size fits all" solution to maintenance issues.

The Legislature directed the Committee to develop standards that consider some of the distinctive qualities of Generating Assets, such as aging facilities scheduled for retirement.³³ We believe the Committee's Maintenance Standards respond to this direction. They allow the Commission, in its

³² See <http://www.cpuc.ca.gov/static/cegfsc/standards.htm>.

³³ Pub. Util. Code § 761.3(e).

enforcement, to adapt the standards to the unique features of Generating Assets. The standards emphasize the importance of an overall maintenance program and strategy that, to be effective, must consider the unique features of each Generating Asset. We believe the certifications and recertifications required by the GO afford the generators numerous opportunities to inform CPSD of these unique characteristics and how these special circumstances are addressed in the generator's maintenance program.

c. Overlap with Other Requirements

Many of the comments pointed to potential conflicts between the standards and other obligations imposed upon generators by FERC, FERC-approved tariffs, CAISO protocols and requirements, contractual obligations, warranty requirements, and Western Electricity Coordinating Council (WECC) and NERC generator reliability protocols. During the proceeding, PG&E submitted the relevant documents concerning the NERC and WECC protocols.

WECC is a 145-member electricity reliability council covering fourteen western states and parts of Canada and Mexico. The council works to ensure reliable and nondiscriminatory transmission access among its members. This goal is accomplished principally through standards that are enforced through contracts among the members. The contracts are also filed with and approved by FERC. For instance, control areas scheduling power through CAISO must execute Reliability Management System Agreements (RMS Agreements). The RMS Agreements require adherence with WECC's reliability criteria. These criteria emphasize technologies, such as properly functioning power system stabilizers and automatic voltage control equipment, which help ensure overall transmission system reliability.

Control areas, which are subject to WECC's contractual obligations, also must self-certify that they meet certain planning standards and operating policies promulgated by NERC. These policies also address overall transmission system reliability and, as a means to ensure that reliability, the appropriate technical requirements for generators to connect to the transmission system.

After examining these and other areas of potential overlap, we find no conflict between the WECC standards and the Maintenance Standards implemented here. First, any overlap between the two sets of standards is very limited. As noted above, WECC standards generally apply to control areas and not individual power plants. Some WECC standards do require that certain control systems at plants operate properly, such as those control systems that change plant output in response to changes in system voltage or frequency. Those plants systems, however, are a small fraction of power plant equipment. Second, where equipment is subject to both WECC requirements and the Maintenance Standards, the Maintenance Standards reinforce, rather than conflict with, WECC requirements by ensuring that the relevant control systems are properly maintained.

Section 761.3(e) also requires that our enforcement not interfere with the regulatory programs of other federal, state, or local agencies that protect the public health or the environment. We have included provisions in our GO concerning the reporting of public health, environmental, and other regulatory information to the appropriate agencies.

d. Relationship to Commission's Ratemaking and Regulatory Functions

Most comments indicated that enforcement of the Maintenance Standards should be distinct from the Commission's ratemaking and other

regulatory functions. As previously discussed, one comment requested the use of performance-based ratemaking as an alternative method for enforcing the Maintenance Standards.

Many regulated firms prefer performance-based requirements because the firms have more flexibility in selecting methods to achieve compliance. The Committee's approach allows generators considerable flexibility in achieving the generally stated standards. The Committee's flexible approach benefits all generators who are subject to the GO. Because we do not determine rates for all generators, however, we are reluctant to use performance-based ratemaking as one method of enforcing the standards. To do so would create separate enforcement tracks that are not available to all generators. For this new program, we believe it is prudent to rely on more traditional enforcement methods to achieve electrical service reliability and adequacy.

F. CEQA Compliance

The California Environmental Policy Act (CEQA) requires that public agencies prepare an environmental impact report whenever the discretionary approval of a proposed project may cause significant adverse impacts on the environment.³⁴ Certain classes of activities have been determined not to have a significant effect on the environment and are exempt from CEQA.³⁵ One of these categorical exemptions applies to the operation, repair, and maintenance of existing electric power generation facilities. We believe the adoption of the accompanying GO, since it pertains to operations and maintenance at these

³⁴ CAL. PUB. RES. CODE § 21002.1 (West 2003).

³⁵ CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15300 (2003).

electric power-generating facilities, is exempt from CEQA.³⁶ Moreover, to the extent these standards apply to a new facility, that facility will be subject to applicable CEQA review when development of the facility is proposed. We ask the Executive Director to file a notice of exemption indicating this determination.

G. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the *Rules of Practice and Procedure*. Comments were filed on March 18, 2004, and reply comments were filed on March 23, 2004. Comments were received from AES entities, Duke Energy North America, Elk Hills Power, High Desert Power Project, Mirant entities, PG&E, Reliance entities, San Diego Gas & Electric Co., Southern California Edison, and West Coast Power. (See Attachment C for the full corporate names of these entities.)

Many of the general comments questioned the Commission's jurisdiction to implement and enforce the GO. Many of the comments also suggested enforcing Pub. Util. Code § 761.3 requirements through the ISO's tariff. These issues were previously addressed in the Draft Decision or in our companion decision on Thermal Logbook Standards. Another general comment criticized the "piecemeal" approach to implementing section 761.3. The Committee has been developing and approving individual sets of standards and filing them with the Commission for implementation and enforcement. Through the adoption of a GO with "place-holders" for forthcoming sets of standards, the Commission is creating the type of integrated document suggested by the comment.

³⁶ *Id.* § 15301(b).

With reference to comments on the major sections of the GO, the Commission responds as follows:

Section 1.0, Purpose. The comment about the underlying authority for the GO was previously addressed on page 1, Attachment B, of this decision. The language has been slightly modified to specify that the purpose of the GO also includes the enforcement of other standards, such as logbook standards, adopted pursuant to Pub. Util. Code § 761.3.

Section 2.0, Definitions/Acronyms. Several comments were offered about the vagueness or breadth of some definitions, such as “Generating Asset Owner.” We do not believe any changes are warranted. Any exclusion of out-of-state or jointly owned facilities is premature. The applicability of section 761.3 and the GO to these types of facilities should be based on a more complete, tested factual record. Normally, we would not consider individual employees or contractors to be Generating Asset Owners, but these persons may have regulatory obligations under the GO (such as the obligation to testify, when requested by the Commission) and, under certain circumstances, they could be considered to exercise managerial or operational control over a Generating Asset.

Section 4.0, General Duty Standards. Comments concerning the authority to adopt, implement, and enforce General Duty Standards was previously addressed in Part E(2)(c) of this decision.

Section 5.0, Generator Logbook Standards (Thermal Energy). Several difficulties were noted in this section including discrepancies concerning the obligation of small generators and the meaning of “compliance document.” We have clarified that Generating Assets of less than 50 megawatts are exempt from all requirements of section 5.0, and this threshold is now consistent with our

decision on Thermal Logbook Standards. We have included a definition of “compliance document,” which refers to logbook requirements.

Section 7.0, Generator Maintenance Standards. Some comments repeated the request that the GO provide a method for CPSD to review and approve maintenance plans. We have previously addressed this concern, discussing the resource constraints on the Commission. With more resources in the future, Commission staff may be able to provide more feedback on content of these plans. Another comment indicated that the GO, in subsection 7.3, requires the submission of maintenance plan changes during recertification, but does not require the submission of maintenance plans in the first instance. We have corrected this error to clarify that amendments to maintenance plans are not submitted to the Commission.

Section 9.0, Independent System Operator (ISO) Outage Coordination Protocol. The comments raised jurisdictional issues that we have addressed previously, both in this decision and the accompanying Thermal Logbook Standards decision.

Section 10, Information Requirements. Some comments were offered on those GO provisions requiring generators to submit information directly or indirectly to the Commission. In response to concerns that CPSD’s information requests might exceed statutory authority, we have added language indicating that the requests must be reasonably related to the enforcement of standards adopted pursuant to Pub. Util. Code § 761.3. We have clarified that the information to be submitted to NERC is of the type that organization accepts. We have also modified subsection 10.4, “Safety-related Incidents,” to clarify the generator’s obligations. We have not changed the response period for information requests, but we note that the existing language specifies “a

minimum of five business days” for such responses. We are confident that CPSD will set reasonable response deadlines based on the relative urgency of the need for such information and on the breadth of the information request. We address confidentiality concerns in our response to comments made on section 15.4, *infra*.

Section 11.0, Audits, Inspections, and Investigations. Some comments repeated a request to include a dispute-resolution process in the GO for disputes arising out of information requests, audits, inspections, and investigations. As we indicated previously, the existing law and motion process provided by Resolution ALJ-164 is limited to “any formal matter pending before the Commission” and does not cover these staff-initiated information requests. Additionally, we believe that CPSD staff has the expertise and professional judgment to make sound decisions about the information that is required for this program. Under subsection 15.4, a generator may raise confidentiality claims; and if formal proceedings are initiated under this GO, generators may raise evidentiary objections to the use of information in those proceedings.

Other comments question the Commission’s authority to interview and examine employees and contractors. The Commission has well-established authority under Pub. Util. Code §§ 311 & 314 (now supplemented by § 761.3) to examine persons under oath, and this authority is not circumscribed by any labor contract to which the Commission is not a party. The GO does not, however, over-ride any constitutional or statutory privilege that may be properly invoked by the examined person.

The CPSD-ordered tests and technical evaluations were also questioned in comments. Most of the anticipated testing will be to validate individual equipment to determine whether it was the cause of an outage or how it is operated and maintained. With the exception of boilers and steam generators,

most powerplant equipment can be physically isolated for testing without causing a plant to go offline or diminished generation. We are confident that CPSD staff has the expertise and professionalism to schedule such tests and evaluations, when reasonably possible and in many of the ways suggested in the comments, to minimize the cost and disruption to generators.

Section 12.0, Violations. We have previously considered and rejected suggestions to define violations as reckless or deliberate acts, and we have given our reasons for this decision. The GO includes provisions allowing the mitigation of sanctions in cases where the violation does not immediately endanger public health or safety or jeopardize the reliability of the electric system. We have also explained why we believe retaliatory actions should also be considered violations of the GO.

Section 13.0, Commission Proceedings. Some participants commented that violations should be considered “alleged” until proven, and we have made this change in the appropriate places. We have previously addressed criticisms that the GO delegates sanctioning authority to CPSD staff in assessing a scheduled fine for a violation of the GO. We once again observe that if a fine is assessed, the generator may contest the assessment in which case the burden will be on CPSD to initiate a formal enforcement proceeding (where the generator will have all procedural rights). The generator’s acceptance of a scheduled fine is entirely voluntary. This expedited procedure reduces the time and expense that a generator, who admittedly has violated the GO, would otherwise face as a respondent in a formal proceeding to determine the sanction. One participant suggested that the fines for specified violations are too high in some circumstances. We are confident that CPSD will assess scheduled fines when the circumstances warrant, and generators will be free to reject the assessment.

We have lengthened the time period for generators to contest an assessment of a scheduled fine and clarified the procedure. We also have amended subsection 13.3.2 to allow more flexibility in the type of notice that will be provided when a proposal is made to modify the schedule of fines.

Section 14.0, Sanctions. We have previously addressed the issue of potentially conflicting government requirements and how the mitigating provisions of this section afford relief to generators in these infrequent circumstances.

Section 15.0, Miscellaneous Provisions. One comments asked about the relationship of the “Notice of Material Change,” subsection 15.1.2, and the “Notice of Significant Changes,” set forth at page 3-8 of the Maintenance Standards for Generators with Suggested Implementation and Enforcement Model. The GO enforces only section 1 of this latter document. The “Notice of Significant Changes” is set forth in section 3 of the document, which the Committee has described as a suggested implementation and enforcement model. While based on the recommended “Notice of Significant Change,” the “Notice of Material Change” requirement of subsection 15.1.2 has additional requirements and is the document required of generators.

In response to other comments, we continue to require verification by a corporate officer because this elevates the importance of the verification to a higher level of the organization. We recognize that some information is more easily maintained in paper format, and CPSD is able to determine when information is reasonably required to be submitted in an electronic format. We have previously addressed our position concerning the duration and amendment of the standards, and our rationale need not be repeated here.

We have modified subsection 15.9 to allow the Executive Director more leeway in granting extensions. We are confident that the Executive Director will issue guidance consistent with section 761.3 and this decision.

Several comments suggested that an immediate effective date might place some generators in immediate violation of the GO. We now indicate that the GO is effective 30 days after the mailing of this decision, once approved by the Commission.

Subsection 10.2, Authorization for Release of Information; subsection 15.4, Confidentiality; and subsection 15.5, Violations of Law. Various comments were submitted concerning the confidentiality provisions of the GO. Participants questioned why the Commission appears to depart from the usual confidentiality procedures under GO 66-C. Many also questioned the sufficiency of protection when confidential information comes to the Commission from another organization or is forwarded by the Commission to another government agency for law enforcement purposes. Some of the comments indicated that the two-year duration of confidentiality protection seems to over-ride statutorily created privileges.

Pub. Util. Code § 583 authorizes the Commission to establish confidentiality policies for information provided to the Commission. For many types of information, GO 66-C has in the past proved useful; but section 583 allows us, as here, to tailor our traditional practices to the needs of a particular implementation and enforcement program. To address concerns about confidential information coming to us from other sources, we have modified subsection 10.2 to provide a more detailed explanation as to when such information will be maintained as confidential. Similarly, in subsection 15.5, we now indicate that, when information is forwarded to another agency, it will be

accompanied by any confidentiality claim asserted by the generator. We have not changed the duration period for confidentiality claims, set forth at subsection 15.4.4. Numerous Commission decisions have granted requests for confidentiality for a limited time, requiring renewal of the claims at the end of the period. We have not experience significant problems with this approach. We agree that often the status of privileged information may not change; but we find it appropriate to require periodic renewal of these claims because circumstances indeed may change over time with regard to both the right of an entity to assert a particular privilege and the balancing of interests for and against disclosure.

Finally, we invited participants to propose categories of information that could be deemed confidential or not confidential in almost all cases. One participant provided an initial list of such categories, albeit without legal or policy analysis to support its choices. We favor an effort to establish prospectively such categories of information that deserve confidential treatment. If participants desire to contribute to such an effort, they may submit their suggested categories directly to the CPSD Director without filing or service in this proceeding.

H. Assignment of Proceeding

Carl Wood is the Assigned Commissioner. John E. Thorson and Burton W. Mattson are the jointly assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. Senate Bill X2 39, Ch. 19 of California Statutes 2001, 2^d Extraordinary Sess., requires the Commission to enforce the maintenance and operations standards adopted by the California Electricity Generation Facilities Standards Committee (Committee). The legislation also requires the Commission to enforce the

protocols for the scheduling of power plant outages of the Independent System Operator (Outage Coordination Protocol).

2. Pursuant to Resolution No. 3, the Committee adopted six General Duty Standards for operation and maintenance on June 3, 2003, and filed the General Duty Standards in this proceeding on June 6, 2003.

3. The Committee adopted a set of Maintenance Standards on May 2, 2003, and filed the Maintenance Standards in this proceeding on May 16, 2003.

4. The General Duty Standards impose broad obligations on generators in their operation and maintenance of electric power generation facilities.

5. The Maintenance Standards pertain to the operation, repair, and maintenance of existing electric power generation facilities.

6. The CAISO has adopted an Outage Coordination Protocol that provides a systematic method of scheduling necessary plant outages and monitoring and investigation of unplanned outages.

7. The parties appearing in this proceeding have had the opportunity to provide written and oral comments on the various methods to enforce the General Duty Standards, Maintenance Standards, and CAISO Protocol and we have considered their views.

8. The goals of the proposed GO are to improve the operations and maintenance practices of those electric generation facilities covered by the order, and to standardize and streamline Commission implementation and enforcement for easier understanding and compliance by covered facilities.

9. These improvements, in turn, will lead to increased efficiency and reliability in electric power generation available to the state.

10. The improvements also will better protect the public health and safety of California residents and businesses.

11. Additional enforcement of the standards might be achieved by incorporating them in the CAISO's tariff filed with the Federal Energy Regulatory Commission, but this approach requires further study.

12. The GO provides a practical and reasonable method for implementing other standards or requirements once the Committee files them with the Commission.

13. The GO provides a practical and reasonable method for updating the standards and requirements after the Committee terminates which, in turn, will allow this legislatively created program to continue in providing electrical service reliability and adequacy.

Conclusions of Law

1. The proposed GO satisfies the requirements of Senate Bill (SB) X2 39, codified at Pub. Util. Code § 761.3.

2. We have the authority under section 761.3 and other provisions of the Public Utilities Code to adopt and enforce the proposed GO.

3. The Committee, as an instrumentality of California state government, is authorized, under section 19 of the Federal Water Power Act, 16 U.S.C. § 812 (2003), to apply General Duty and Maintenance Standards to federally licensed hydroelectric Generating Assets.

4. The Commission, as a constitutionally created state agency, is also authorized under section 19 of the Federal Water Power Act to implement and enforce General Duty and Maintenance Standards against federally licensed hydroelectric Generating Assets. We do not implement and enforce all provisions of the GO against hydroelectric Generating Assets since we seek a cooperative relationship with FERC, based on intergovernmental comity,

allowing the joint expertise of both commissions to be utilized in securing the safe, efficient, and reliable operation of these facilities.

5. Once the Committee terminates, we continue to have an obligation under section 761.3 to implement and enforce the standards and to modify and update the specific requirements under the eighteen broad performance objectives, so long as the changes remain consistent with those broad objectives.

6. Our approval of the proposed GO is exempt from the requirements of CEQA.

7. The Commission should adopt and enforce the proposed GO.

8. The GO will be utilized to implement and enforce other standards and requirements adopted by the Committee.

9. Our order should be effective immediately so that California's electrical service reliability and adequacy are improved.

O R D E R

IT IS ORDERED that:

1. General Order (GO) No. [tentatively 167], set forth as Attachment A to this decision, is adopted.

2. Sections 7.0, 9.0, 10.3, 10.4, or 15.1 of the GO will not, for the moment, be implemented or enforced against hydroelectric Generating Assets licensed by FERC.

3. The Executive Director shall prepare and file a notice indicating our determination that the approval of the GO is categorically exempt from the California Environmental Policy Act.

4. As discussed in Part E(1)(f)(2) of the decision, the Executive Director shall investigate and report within 180 days on the possibility of further enforcing the

standards implemented and enforced the GO by also incorporating them in the tariff filed by the California Independent System Operator with the Federal Energy Regulatory Commission.

5. The Executive Director shall regularly update the GO so that it includes, as appendices, all standards and requirements adopted by the Committee and approved for implementation and enforcement by the Commission.

6. The Executive Director shall serve a notice of this decision and the General Order on the owner or operator of each electric generation facility subject to Pub. Util. Code § 761.3 that is not already on the service list for this proceeding.

7. This proceeding remains open.

This order is effective today.

Dated _____, at San Francisco, California.

Attachment A:

Public Utilities Commission of the State of California

General Order No. [Tentatively 167]

Enforcement of Maintenance and Operational Standards
for Electric Generating FacilitiesAdopted _____, 2003. Effective _____, 2003.
(D.03-__-__ in R.02-11-39)**TABLE OF CONTENTS**

1.0 Purpose.....	1
2.0 Definitions/Acronyms	2
3.0 Required Compliance	5
4.0 General Duty Standards.....	5
5.0 Generator Logbook Standards (Thermal Energy).....	6
6.0 Generator Logbook Standards (Hydro) [Reserved].....	7
7.0 Generator Maintenance Standards.....	7
8.0 Generator Operational Standards [Reserved].....	9
9.0 Independent System Operator (ISO) Outage Coordination Protocol	9
10.0 Information Requirements.....	9
11.0 Audits, Inspections, and Investigations.....	11
12.0 Violations	12
13.0 Commission Proceedings.....	13
14.0 Sanctions.....	14
15.0 Miscellaneous Provisions.....	16
Appendix A: General Duty Standards.....	21
Appendix B: Generator Logbook Standards (Thermal energy) [Reserved].....	23
Appendix C: Generator Maintenance Standards	24
Appendix D: Generator Operational Standards [Reserved].....	25
Appendix E: Fines for Specified Violations.....	26

1.0 PURPOSE

The purpose of this General Order is to implement and enforce standards for the maintenance and operation of electric generating facilities and power plants so as to maintain and protect the public health and safety of California residents and businesses,

and to ensure electrical service reliability and adequacy. The General Order provides a continuing method to implement and enforce General Duty Standards for Operations and Maintenance, Generation Maintenance Standards (Maintenance Standards), Generation Operational Standards, and any other standard adopted pursuant to Public Utilities Code § 761.3 (Chapter 19 of the Second Extraordinary Session of 2001-02 (SBX2 39, Burton *et al.*). The General Order also provides a means to enforce the protocols for the scheduling of power plant outages of the California Independent System Operator. The General Order is based on the authority vested in the California Public Utilities Commission by the California Constitution; California statutes and court decisions; prior Commission decisions and orders; and federal law including, but not limited to, section 714 of the Energy Policy Act of 1992, 16 U.S.C. § 824(g).

2.0 DEFINITIONS/ACRONYMS

- 2.1 “Active Service” means the status of an electric generating unit that is interconnected and is capable of operating in parallel with the electricity grid.
- 2.2 “California Independent System Operator” or “ISO” is that nonprofit public benefit corporation authorized under Public Utilities Code § 345 *et seq.* to operate California’s wholesale power grid.
- 2.3 “Commission” means the California Public Utilities Commission.
- 2.4 “Committee” means the California Electricity Generation Facilities Standards Committee, formed pursuant to Public Utilities Code § 761.3(b).
- 2.5 “Consumer Protection and Safety Division” or “CPSD” means that division of the Commission, or any successor entity, designated by the Commission to enforce this General Order.
- 2.6 “Exigent circumstance” means any condition related to the operation and maintenance of a Generating Asset that may result in imminent danger to public health or safety, including electrical service reliability or adequacy, or to persons in the proximity of a Generating Asset.
- 2.7 “General Duty Standards” means the General Duty Standards for Operation and Maintenance, adopted by the Committee on June 3, 2003, and set forth as Attachment A to Committee Resolution No. 3, which was filed with the Commission on June 6, 2003. This initial set of General Duty Standards is set forth in Appendix A to this General Order. “General Duty Standards” also includes any subsequent amendments or revisions to those standards

- 2.8 “Generating Asset” means any device owned by an electrical corporation (as that term is defined in Public Utilities Code § 218) or located in the State of California used for the generation of electric energy. To be a Generating Asset, the device must have a metered output, or an administratively defined group of generating devices that may or may not have individual metered outputs, but are aggregated for performance measurement. *However*, for the purposes of this General Order, a Generating Asset does not include:
- 2.8.1 A nuclear powered generating facility that is federally regulated and subject to standards developed by the Nuclear Regulatory Commission, and whose owner or operator participates as a member of the Institute of Nuclear Power Operations, *provided* that the owner or operator of such a facility shall comply with the reporting requirements of Public Utilities Code § 761.3(d).
 - 2.8.2 A qualifying small power production facility or a qualifying cogeneration facility within the meaning of sections 201 and 210 of Title 11 of the federal Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 796(17), 796(18) & 824a-3) and the regulations adopted pursuant to those sections by the Federal Energy Regulatory Commission (18 C.F.R. §§ 292.101 to –602, inclusive), *provided* that an electrical corporation that has a contract with a qualifying small power production facility, or a qualifying cogeneration facility, with a name plate rating of 10 megawatts or greater, shall comply with the reporting requirements of Public Utilities Code § 761.3(d)(2)(B).
 - 2.8.3 A generation unit installed, operated, and maintained at a customer site, exclusively to serve that customer’s load.
 - 2.8.4 A facility owned by a local publicly owned electric utility as defined in Public Utility Code § 9604(d).
 - 2.8.5 A facility at a public agency that is used to generate electricity incidental to the provision of water or wastewater treatment.
 - 2.8.6 A facility owned by a city and county operating as a public utility, furnishing electric service as provided in Public Utility Code § 10001.
- 2.9 “Generating Asset Owner” means any person or entity owning, controlling, operating, or managing a Generating Asset. “Generating Asset Owner” includes, but is not limited to, an electrical corporation (as

that term is defined in Public Utilities Code § 218). “Generating Asset Owner” does not include any governmental agency.

- 2.10 “Generating Availability Data System” or “GADS” means that data base system maintained by the North American Electric Reliability Council (NERC) which collects, records, and retrieves operating information for improving the performance of electric generating equipment.
- 2.11 “Generator Logbook Standards (Hydro)” [Reserved].
- 2.12 “Generator Logbook Standards (Thermal Energy)” means the “Electricity Generating Facility Logbook Standards for Thermal Power Plants,” adopted by the Committee on April 1, 2003, and filed with the Commission on April 2, 2003. The Generator Logbook Standards (Thermal Energy) are set forth as Appendix B to this General Order. “Generator Logbook Standards” also includes any subsequent amendments or revisions to those standards.
- 2.13 “Generator Maintenance Standards” means section 1 of the “Maintenance Standards for Generators with Suggested Implementation and Enforcement Model,” adopted by the Committee on May 2, 2003, and filed with the Commission on May 16, 2003. The Generator Maintenance Standards are set forth as Appendix C to this General Order. “Generator Maintenance Standards” also includes any subsequent amendments or revisions to those standards.
- 2.14 “Generator Operational Standards” [Reserved].
- 2.15 “Initial Certification” means the first document filed by a Generating Asset Owner for a specific Generating Asset certifying that the Generating Asset Owner has adopted and is implementing a Maintenance Plan for that Generating Asset, as required by section 7.2.2 of this General Order.
- 2.16 “NERC” means the North American Electric Reliability Council or any successor thereto.
- 2.17 “Notify CPSD,” “file with the Commission,” “filing,” or “file” means (unless otherwise indicated) to send a written communication by the U.S. Mail or a more expeditious express mail service to the Consumer Protection and Safety Division, Electric Generation Performance Program, at the address specified in subsection 15.2 of this General Order. These written communications are not filed with the Commission’s Docket Office.

- 2.18 “Outage Coordination Protocol” means that document set forth as sheets 509-535 (effective October 13, 2000) in the ISO tariff to coordinate schedules for maintenance, repair and construction of generating units, sections of the ISO controlled grid, and interconnections, as well as any subsequent amendments to the document.
- 2.19 “Scheduling Logging for the ISO of California” or “SLIC” is a web-based system application and procedure, and any successor system, used by the ISO and external clients for scheduling of generator outages.
- 2.20 “Standards” is a collective term including all the individual standards enforced pursuant to this General Order: General Duty Standards, Generating Logbook Standards (Hydro), Generating Logbook Standards (Thermal Energy), Generator Maintenance Standards, Generator Operational Standards, and the Outage Coordination Protocol of the ISO, as set forth in subsection 9.1 of this General Order.
- 2.21 “Thermal Energy” is the production of electricity from heat generated from combustion of fuels, recovery of heat from discharges from a turbine or other device powered by the combustion of fuels, and geothermal energy.

3.0 REQUIRED COMPLIANCE

All Generating Asset Owners shall comply with this General Order.

4.0 GENERAL DUTY STANDARDS

- 4.1 The General Duty Standards are set forth in Appendix A to this General Order, as modified by any subsequent amendments or revisions to those standards.
- 4.2 All Generating Asset Owners shall operate and maintain their Generating Assets in compliance with the General Duty Standards, as modified by any subsequent amendments or revisions to those standards.
- 4.3 The General Duty Standards complement the more specific requirements contained in Generating Logbook Standards (Hydro), Generating Logbook Standards (Thermal Energy), Generator Maintenance Standards, and Generator Operational Standards. To the extent that an action or requirement is addressed by a more specific Standard, compliance with the specific Standard shall be deemed compliance with the General Duty Standard.

5.0 GENERATOR LOGBOOK STANDARDS (THERMAL ENERGY)

- 5.1 Required Logbooks. Unless exempted, all Generating Asset Owners shall maintain facility logbooks for Generating Assets generating electricity by the use of Thermal Energy, as required by the Generator Logbook Standards (Thermal Energy).
- 5.2 Exemption. Generating Assets with a nameplate rating of less than 50 megawatts are exempt from this section 5.0. The Executive Director may exempt other categories of Generating Assets from subsection 5.1 based on vintage, technology, megawatt capacity, or ownership.
- 5.3 Verified Statement. For each Generating Asset, the Generating Asset Owner shall file one original verified statement with the Director of the Commission's CPSD. The verified statement shall include at least the following:
- 5.3.1 The identify of the Generating Asset owned by an electrical corporation or located in California (with relevant identification and contact information);
 - 5.3.2 Confirmation that the facility is maintaining logbooks in compliance with the requirements for Logbook Standards for thermal powerplants adopted by the California Electricity Generation Facilities Standards Committee;
 - 5.3.3 Confirmation that the compliance document required by the Commission has been prepared and is available at the generation facility site;
 - 5.3.4 Confirmation that logbooks and the compliance document are being and will be updated and maintained as necessary; and
 - 5.3.5 Signature, name, title, address, telephone number, facsimile number, electronic mail address, and other relevant information regarding the authorized representative of the Generating Asset Owner.
- 5.4 Time of Filing. For each Generating Asset in Active Service on the effective date of this General Order, the Generating Asset Owner shall file the Verified Statement within 45 days of the effective date of this General Order.
- 5.5 Time of Filing for Other Assets. For each Generating Asset placed in Active Service after the effective date of this General Order, the

Generating Asset Owner shall file the Verified Statement within 45 days of the Generating Asset being placed in Active Service. When a Generating Asset Owner acquires a Generating Asset from an existing Generating Asset Owner, the new owner shall file a verified statement within 45 days of the effective date of the transfer of title or within 45 days of the transfer of possession, whichever date is later.

- 5.6 Compliance Document. Each Generating Asset Owner shall prepare and maintain a compliance document. The compliance document will be available at the generation facility site. The compliance document will show:

- 5.6.1 Where data required by the thermal logbook standards is recorded and maintained.
- 5.6.2 How data is recorded and maintained (*e.g.*, hard copy or electronic).
- 5.6.3 Any necessary format or presentation protocols that must be understood to decipher the meaning of the electronically or manually maintained data.
- 5.6.4 Anything else reasonably necessary to fulfill or demonstrate compliance with the thermal logbook standards.

6.0 GENERATOR LOGBOOK STANDARDS (HYDRO) [RESERVED]

7.0 GENERATOR MAINTENANCE STANDARDS

- 7.1 Applicability of Standards. All Generating Asset Owners shall maintain their Generating Assets in compliance with the Generator Maintenance Standards.
- 7.2 Initial Certification of Maintenance Plans.
 - 7.2.1 Content of Maintenance Plan. A Maintenance Plan is a paper or electronic document that demonstrates how the Generating Asset Owner's ongoing and routine practices concerning a Generating Asset satisfy the Maintenance Standards enforced under this General Order. The Maintenance Plan may be in the form of a narrative, index, spreadsheet, database, web site, or other format that, for each of the Maintenance Standards, specifically identifies the procedures and criteria that are utilized to satisfy the applicable standard and assessment guidelines. Existing equipment manuals, checklists, warranty requirements, and other documents may be

identified to demonstrate compliance; but, if any of these documents are contradictory, the Maintenance Plan will resolve the contradiction.

- 7.2.2 Certificate of Compliance. For each Generating Asset, the Generating Asset Owner shall certify to CPSD that it has adopted and is implementing a Maintenance Plan that complies with the Generator Maintenance Standards.
- 7.2.3 Certificate of Noncompliance. If a Generating Asset Owner is unable to so certify as required by subsection 7.2.2, the Generating Asset Owner shall certify to CPSD that it has (a) identified and documented the deficiencies in its maintenance practices; and (b) adopted a Corrective Plan that is reasonably designed to achieve compliance with the Generator Maintenance Standards within 180 days of the certification. The Corrective Plan will document how the Generating Asset Owner's ongoing and routine business practices concerning a Generating Asset do not satisfy the Maintenance Standards, the procedures and criteria that will be developed to satisfy the Maintenance Standards, the persons or entities responsible for addressing the deficient procedures or criteria, and a timetable for achieving compliance with the Maintenance Standards.
- 7.2.4 Time of Filing. For each Generating Asset in Active Service on the effective date of this General Order, the Generating Asset Owner shall file the Initial Certification within 90 days of the effective date of this General Order.
- 7.2.5 Time of Filing for Other Assets. For each Generating Asset placed in Active Service after the effective date of this General Order, the Generating Asset Owner shall file the Initial Certification within 90 days of the Generating Asset being placed in Active Service. When a Generating Asset Owner acquires a Generating Asset from an existing Generating Asset Owner, the new owner shall file its Initial Certification within 90 days of the effective date of the transfer of title or within 90 days of the transfer of possession, whichever date is later.
- 7.3 Recertification of Maintenance Plans. For each Generating Asset, the Generating Asset Owner shall recertify to CPSD the information required by subsection 7.2.2 of this General Order. If a Generating Asset Owner is unable to recertify that its Maintenance Plan complies with the Generator Maintenance Standards, the Generating Asset Owner shall comply with subsection 7.2.3 of this General Order

- 7.4 Maintenance and Corrective Plan Availability. The current Maintenance or Corrective Plan for each Generating Asset will be available in the vicinity of each Generating Asset or, in the case of a plant or facility with multiple Generating Assets, in the central business office located at that plant or facility. Upon CPSD's request, a Generating Asset Owner shall submit the current Maintenance or Corrective Plan to CPSD in the manner specified in subsection 15.2 of this General Order.
- 7.5 Exemption. Generating Assets where the total nameplate rating generating capacity at that plant or location is less than 50 megawatts are exempt from subsections 7.2, 7.3, and 7.4 of this section 7.0. The Executive Director may exempt other categories of Generating Assets from subsections 7.2, 7.3, or 7.4 based on vintage, technology, megawatt capacity, or ownership.

8.0 GENERATOR OPERATIONAL STANDARDS [RESERVED]

9.0 INDEPENDENT SYSTEM OPERATOR (ISO) OUTAGE COORDINATION PROTOCOL

- 9.1 Compliance. All Generating Asset Owners shall comply with the Outage Coordination Protocol adopted by the California Independent System Operator.

10.0 INFORMATION REQUIREMENTS

- 10.1 Provision of Information. Upon CPSD's request, a Generating Asset Owner shall provide information in writing concerning (a) a Generating Asset; (b) the operation or maintenance of the Generating Asset; (c) the, Initial Certification, Recertification, Corrective Plan, or Notice of Material Change pertaining to the Generating Asset; (d) any Maintenance, Operational, or Corrective Plans pertaining to the Generating Asset; (e) the design, performance, or history of a Generating Asset; (f) event or outage data concerning a Generating Asset including, but not limited to, unavailability reports or outage cause reports; (g) accounts, books, contracts, memoranda, papers, records, inspection reports of government agencies or other persons; and (h) any other documents or materials. These information requests shall be reasonably related to the requirements of this General Order. If CPSD has indicated when, where, and in what form the information is to be provided, the Generating Asset Owner will provide the information in that manner and will otherwise cooperate with CPSD in the provision of information. Except for an exigent circumstance, a minimum of five business days will be provided for the response. If CPSD determines the existence of an exigent circumstance,

CPSD may establish a shorter response period for information reasonably required for CPSD to understand or respond to the exigent circumstance.

- 10.2 Authorization for Release of Information. Upon CPSD's request, a Generating Asset Owner shall authorize state agencies and state-created private entities to release and provide directly to CPSD any information in that agency's or entity's possession regarding the operation or maintenance of that Generating Asset Owner's Generating Asset. To the extent such agencies have designated information as confidential, CPSD will not disclose that information to the public unless (a) CPSD has been authorized by that agency or entity to disclose the information; (b) the Commission orders disclosure; or (c) a court of competent jurisdiction orders disclosure. Upon CPSD's request, a Generating Asset Owner shall authorize other persons or entities to release and provide directly to CPSD any information in the possession of that person or entity regarding the operation or maintenance of that Generating Asset Owner's Generating Asset, in which case the Generating Asset Owner may make a claim of confidentiality pursuant to subsection 15.4 of this General Order.
- 10.3 Generating Asset Information. A Generating Asset Owner's obligations to provide or authorize the release of information specified in subsections 10.1 and 10.2 include, but are not limited by, the following specific requirements concerning Generating Assets:
- 10.3.1 Monthly Report to ISO. As required by Public Utilities Code § 761.3(g), each Generating Asset Owner owning or operating a Generating Asset in California with a rated maximum capacity of 50 megawatts or greater shall provide a monthly report to the ISO (once the ISO has announced it is ready to receive such monthly reports) that identifies any periods during the preceding month when the unit was unavailable to produce electricity or was available only at reduced capacity. The report will include the reasons for any such unscheduled unavailability or reduced capacity.
- 10.3.2 Submission of Information to NERC. Except for Generating Assets for which NERC does not accept data, each Generating Asset Owner shall submit generator design, performance, and event data to NERC for inclusion in GADS. Within the categories of data that NERC accepts, CPSD may specify the data the Generating Asset Owner must submit to NERC. If requested by CPSD, a Generating Asset Owner shall concurrently provide CPSD with a copy of all data submitted to NERC for inclusion in GADS.

- 10.3.3 Transitional Compliance Period. If upon the effective date of this General Order, a Generating Asset Owner is not submitting generator design, performance, or event data concerning a Generating Asset to NERC for inclusion in GADS, the Generating Asset Owner shall do so within a transitional period of 180 days of the effective date of this General Order. Upon CPSD's request, the Generating Asset Owner shall provide comparable data directly to CPSD until the Generating Asset Owner begins to submit that information to NERC and the information becomes available to CPSD.
- 10.3.4 Historical Information. Upon CPSD's request, and for any period after January 1, 1998, a Generating Asset Owner shall provide CPSD with generator design, performance, or event data concerning a Generating Asset.
- 10.4 Safety-related Incidents. Within 24 hours of its occurrence, a Generating Asset Owner shall report to the CPSD Director or designee, either verbally or in writing, any safety-related incident involving a Generating Asset. Such reporting shall include any incident that has resulted in death to a person; an injury or illness to a person requiring overnight hospitalization; a report to Cal/OSHA, OSHA, or other regulatory agency; or damage to the property of the Generating Asset Owner or another person of more than \$50,000. The Generating Asset Owner shall also report any other incident involving a Generating Asset that has resulted in significant negative media coverage (resulting in a news story or editorial from one media outlet with a circulation or audience of 50,000 or more persons) when the Generating Asset Owner has actual knowledge of the media coverage. If not initially provided, a written report also will be submitted within five business days of the incident. The report will include copies of any reports concerning the incident that have been submitted to other governmental agencies.

11.0 AUDITS, INSPECTIONS, AND INVESTIGATIONS

- 11.1 General Requirement. A Generating Asset Owner shall cooperate with CPSD during any audit, inspection (including but not limited to tests, technical evaluations, and physical access to facilities), or investigation. An audit, inspection, or investigation may extend to any records pertaining to the specifications, warranties, logbooks, operations, or maintenance of the Generating Asset. Generating Asset Owners, as entities subject to ongoing regulation under this General Order, are hereby notified that these audits, inspections, or investigations will occur on a regular, systematic, and recurring basis supplemented as needed by additional audits,

inspections, or investigations to ensure compliance with this General Order.

- 11.2 Interviews and Testimony. Upon CPSD's request, a Generating Asset Owner, its employees, and its contractors shall provide testimony under oath or submit to interviews concerning a Generating Asset, its specifications, warranties, logbooks, operations, or maintenance.
- 11.3 Tests and Technical Evaluations. Upon CPSD's request, a Generating Asset Owner shall conduct a test or technical evaluation of a Generating Asset (or shall contract with an auditor, consultant, or other expert, mutually selected by CPSD and the Generating Asset Owner, to conduct the test or technical evaluation) so as to provide information reasonably necessary for determining compliance with the Standards enforced by this General Order. The Generating Asset Owner will pay all costs and liabilities resulting from such tests or technical evaluations, except for CPSD's own staff expenses. If a test or technical evaluation may reasonably result in the reduced or suspended generation from a Generating Asset, the Generating Asset Owner shall notify CAISO as soon as the Generating Asset Owner becomes aware of the test or technical evaluation.
- 11.4 Preservation of Records. A Generating Asset Owner shall retain all records including logbooks, whether in paper or electronic format, concerning the operation and maintenance of a Generating Asset for five years. Any subsequent modification to a record must show the original entry, the modified entry, the date of the modification, the person who made or authorized the modification, and the reason for the modification.
- 11.5 Third-Party Audits, Tests, or Technical Evaluations. During an audit, test, or technical evaluation conducted under this section 11.0, a Generating Asset Owner may submit, or authorize access to, audits, tests, inspections, or technical evaluations previously performed by government agencies, insurance companies, or other persons or entities. While this third-party information may be relevant to the inquiry, the information may not be sufficient, in and of itself, to demonstrate compliance with the standards. CPSD will determine whether a third-party audit, test, inspection, or technical evaluation is sufficient for the purposes of this section 11.0.

12.0 VIOLATIONS

- 12.1 Violation. A Violation is the failure of a Generating Asset Owner to comply with a requirement of this General Order.

- 12.2 Retaliation. Any adverse action, as that term has been used and applied under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* or the California Fair Employment and Housing Act, Gov. Code § 12940 *et seq.*, taken by a Generating Asset Owner against an officer, employee, agent, contractor, subcontractor, or customer of a Generating Asset Owner for reporting a Violation of the Standards, reporting a Violation of this General Order, or providing information during the course of an audit, inspection, or investigation is also a Violation of this General Order.

13.0 COMMISSION PROCEEDINGS

- 13.1 Formal Enforcement Proceedings. In responding to alleged Violations of this General Order, the Commission may initiate any formal proceeding authorized by the California Constitution, the Public Utilities Code, other state and federal statutes, court decisions or decrees, the Commission's RULES OF PRACTICE AND PROCEDURE, or prior Commission decisions or rulings.
- 13.2 Other Commission Remedies. In enforcing the provisions of this General Order, the Commission may pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.
- 13.3 Imposition of Fines for Specified Violations
- 13.3.1 Specified Violations. For specified Violations of this General Order, CPSD may assess a scheduled fine or, in the alternative, proceed with any remedy otherwise available to CPSD or the Commission. Scheduled fines may be assessed only on the concurrence of the Generating Asset Owner against whom the fine is imposed and only for the Violations set forth in subsection 13.3.2 of this General Order. Scheduled fines may be assessed only after the Generating Asset Owner has brought itself into compliance with the applicable provision(s) of the General Order.
- 13.3.2 Schedule of Fines. The specified Violations and the corresponding fines that may be assessed are set forth in Appendix E to this General Order. The Commission may modify this schedule of fines no earlier than 30 days after providing reasonable notice and affording interested persons with an opportunity to comment.
- 13.3.3 Acceptance of Assessed Fine. A Generating Asset Owner may accept or contest the assessment of a scheduled fine. In the event the Generating Asset Owner accepts the assessment and elects to pay the scheduled fine in lieu of a formal proceeding, the Generating Asset Owner shall so notify CPSD in writing within

30 days of the assessment and shall pay the fine in full within 30 days of the written acceptance. Fines shall be submitted to CPSD for payment into the State Treasury to the credit of the General Fund. Fines are delinquent if not paid within 30 days of the Generating Asset Owner's acceptance; and, thereafter, the balance of the fine bears interest at the legal rate for judgments.

- 13.3.4 Contest of Assessed Fine. If a Generating Asset Owner contests the assessment of a scheduled fine, the Generating Asset Owner must file its contest within 30 days of the assessment. In the event of such a contest, CPSD may withdraw the offer of a scheduled fine and proceed with any remedy otherwise available to the Commission; and, in thereafter sanctioning a Violation, the Commission and CPSD will not be limited by the Schedule of Fines set forth in Appendix E to this General Order.
- 13.4 Punishment of Contempt. If the Commission determines that the Generating Asset Owner has violated Public Utilities Code § 2113, the Commission may punish the contempt in the same manner and to the same extent as contempt is punished by the courts of record in this state. The Commission, other persons, and other government agencies may still pursue any other remedies available to them.
- 13.5 Other Remedies. The Commission's enforcement of this General Order by informal proceedings, formal proceedings, or other remedies does not bar or affect the remedies otherwise available to other persons or government agencies.

14.0 SANCTIONS

- 14.1 Sanctions. Consistent with prior Commission decisions, the following factors will be considered in determining the sanctions to be imposed against a Generating Asset Owner for violating this General Order:
 - 14.1.1 The diligence and reasonableness demonstrated by the Generating Asset Owner in attempting to prevent a Violation, in detecting a Violation, in disclosing a Violation to CPSD and other requisite government agencies, and in rectifying a Violation.
 - 14.1.2 The seriousness of the Violation in terms of injury, if any, to persons, property, and the integrity of the regulatory process.
 - 14.1.3 The number and seriousness of any prior Violations.
 - 14.1.4 The Generating Asset Owner's financial resources.

- 14.1.5 The totality of the circumstances in furtherance of the public interest.
- 14.1.6 Commission precedent.
- 14.2 Mitigation of Sanctions. The following factors may be considered as mitigation in considering the sanctions to be imposed for violating this General Order:
 - 14.2.1 The Generating Asset Owner's demonstrated, substantial compliance with any guidelines or other guidance issued by the Committee or the Executive Director concerning the Standards and requirements of this General Order.
 - 14.2.2 Conflicting or competing requirements imposed on the Generating Asset Owner by other governmental agencies; warranty requirements; power contract requirements; or requirements imposed by the California Independent System Operator, NERC, or the Western Electricity Coordinating Council.
 - 14.2.3 Penalties already imposed on the Generating Asset Owner by other governmental agencies, contracts, or other regulatory bodies for the same acts or omissions resulting in Violations of this General Order.
 - 14.2.4 The Generating Asset Owner's demonstrated cooperation in assisting the Commission and CPSD in the enforcement of this General Order.
- 14.3 Enhancement of Sanctions. The following enhancing factors may be considered in increasing the sanctions that would otherwise be imposed for violating this General Order:
 - 14.3.1 The Generating Asset Owner's demonstrated, substantial noncompliance with any guidelines or other guidance issued by the Committee or the Executive Director concerning the Standards and requirements of this General Order.
 - 14.3.2 The Generating Asset Owner's repetitive violations of the Standards, the Public Utilities Code, or this General Order.
 - 14.3.3 The Generating Asset Owner's violations of the Standards or this General Order have resulted in the failure to deliver electricity as

scheduled by the Independent System Operator or in actual power outages.

- 14.3.4 The Generating Asset Owner's failure to report, as required, or cooperate with the Commission and CPSD in any investigation, audit, inspection, test, or technical evaluation.
 - 14.3.5 The Generating Asset Owner's efforts to impede or frustrate CPSD in the enforcement of this General Order. A Generating Asset Owner's lawful and reasonable assertion of its rights under this General Order or state or federal law will not be used to enhance a sanction.
- 14.4 Not Applicable to Specified Fines. The factors set forth in subsections 14.1, 14.2, and 14.3 do not apply to those specified Violations, set forth in Appendix E, for which a scheduled fine has been assessed against and accepted by a Generating Asset Owner, pursuant to subsection 13.3 of this General Order.

15.0 MISCELLANEOUS PROVISIONS

- 15.1 Ongoing Reporting Obligations.
 - 15.1.1 Periodic Recertifications. For each Generating Asset, the Generating Asset Owner shall file a recertification that it continues to maintain logbooks as required under section 5.0 of this General Order and continues to implement a Maintenance Plan, as described in subsection 7.2.1 of this General Order in a manner that complies with the Generator Maintenance Standards. The recertifications will be filed every other year pursuant to a schedule to be determined by CPSD.
 - 15.1.2 Notice of Material Change. A Generating Asset Owner shall notify CPSD of (a) any previously unreported deficiency in its operational or maintenance practices (including logbook practices); or (b) any correction or amendment to the Initial Certification or Recertification pertaining to a Generating Asset that is required because of a material change in the operation or maintenance of the Generating Asset. A material change is a modification of the characteristics, operation, or maintenance of a Generating Asset when that change reasonably could be expected to significantly improve or degrade the reliability, output, or performance of the Generating Asset. The Generating Asset Owner shall file a Notice of Material Change within 30 days of the known occurrence of the material change.

- 15.2 Filings and Submissions. All Certifications, Recertifications, Notices, or other submissions of information or data in response to Commission requests and the requirements of this General Order will be filed directly with the CPSD, Electric Generation Performance Program, at 505 Van Ness Ave., San Francisco, CA 94102. Documents must be received by CPSD on the day they are due. CPSD may also require electronic submissions of all filings that reasonably can be created in that format.
- 15.3 Oath, Affirmation or Verification. Each Certification, Recertification, Notice, or contest submitted under this General Order will be under the written oath, affirmation, or verification of a corporate officer of the Generating Asset Owner.
- 15.4 Confidentiality. All claims of confidentiality related to the implementation and enforcement of this General Order must be based on the provisions of this subsection.
- 15.4.1 Burden of Establishing Privilege. A Generating Asset Owner must accompany any requests for confidential treatment of information with a reference to the specific law prohibiting disclosure, the specific statutory privilege that it believes it holds and could assert against disclosure, or the specific privilege it believes the Commission may and should assert against disclosure. The Generating Asset Owner bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure.
- 15.4.2 Confidentiality Claims Requiring Balancing of Interests. If a confidentiality request is based on a privilege or exemption requiring a balancing of interests for and against disclosure, rather than on a statutory prohibition against disclosure or a privilege held by the Generating Asset Owner, the Generating Asset Owner must demonstrate why the public interest in an open process is clearly outweighed by the need to keep the material confidential. A Generating Asset Owner which is a public utility should not cite Public Utilities Code § 583 as a sole basis for the Commission's nondisclosure of information since, as noted in D.91-12-019, § 583 does not create for a utility any privilege that may be asserted against the Commission's disclosure of information or designate any specific types of documents as confidential.
- 15.4.3 Requirements. A Generating Asset Owner desiring confidential treatment of information provided to the Commission shall at a minimum:

- 15.4.3.1 Specifically indicate the information that the Generating Asset Owner wishes to be kept confidential, clearly marking each page, or portion of a page, for which confidential treatment is requested.
- 15.4.3.2 Identify the length of time the Generating Asset Owner believes the information should be kept confidential and provide a detailed justification for the proposed length of time. The business sensitivity of information generally declines over time and the balancing of interests for and against disclosure may change accordingly.
- 15.4.3.3 Identify any specific provision of state or federal law the Generating Asset Owner believes prohibits disclosure of the information for which it seeks confidential treatment and explain in detail the applicability of the law to that information.
- 15.4.3.4 Identify any specific privilege the Generating Asset Owner believes it holds and may assert to prevent disclosure of information and explain in detail the applicability of that law to the information for which confidential treatment is requested. For example, if a Generating Asset Owner asserts that information is subject to a trade secret privilege (Evidence Code § 1060 *et seq.*), the Generating Asset Owner must explain (a) how the information fits the definition of a protectible trade secret (*e.g.*, how the information provides its holder with economic value by virtue of its not being generally known to the public and what steps the Generating Asset Owner has taken to maintain the secrecy of the information); and (b) why allowance of the privilege will not tend to conceal fraud or otherwise work injustice.
- 15.4.3.5 Identify any specific privilege the Generating Asset Owner believes the Commission holds and may assert to prevent disclosure of information and explain in detail the applicability of that privilege to the information for which confidential treatment is requested. For example, if the privilege is one that involves a balancing of public interests for and against disclosure, such as the official information privilege in Evidence Code § 1040(b)(2), the Generating Asset Owner must demonstrate that the information at issue falls within the definition of official information and the

Commission's disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.

15.4.3.6 State whether the Generating Asset Owner would object if the information were disclosed in an aggregated format.

15.4.3.7 State whether and how the Generating Asset Owner keeps the information confidential and whether the information has ever been disclosed to a person other than an employee of the Generating Asset Owner.

15.4.4 Duration of Confidentiality Claims. A confidentiality claim, whether or not specifically acted upon by the Commission, expires on the earliest of the following dates: (a) at the end of the period specified by the Generating Asset Owner pursuant to subsection 15.4.3.2; (b) at the end of a period specified in a specific Commission ruling or decision; or (c) two years after the claim was first asserted before the Commission. To reassert the confidentiality claim, the Generating Asset Owner must again satisfy the requirements of this subsection 15.4 before the end of the confidentiality period.

15.5 Disclosure to Other Agencies. When the Commission obtains information indicating a possible violation of any federal, state, or local law, the Commission may provide that information to the appropriate government agency. Even though a claim of confidentiality has been made, the claim of confidentiality will not prevent the Commission from providing that information to the appropriate government agency. If the Commission provides such information to another government agency (whether in response to a request, subpoena, or on the Commission's own initiative), the Commission will ensure that the information is accompanied with a copy of any confidentiality claim that has been submitted pursuant to subsection 15.4 of this General Order. Where appropriate, the Commission may enter into a confidentiality agreement with the other government agency.

15.6 Compliance with Other Laws. Pursuant to California Public Utilities Code § 761.3(f), enforcement of any Standard will not modify, delay, or abrogate any deadline, standard, rule or regulation that is adopted by a federal, state, or local agency for the purposes of protecting public health or the environment including, but not limited to, any requirements imposed by the California State Air Resources Board, an air pollution control district, or an air quality management district pursuant to Division

26 (commencing with section 39000) of the California Health and Safety Code.

- 15.7 Committee Amendments. The Committee may file any amendment to the Standards, duly adopted by the Committee, with the Commission's Docket Office. The Committee shall serve the amendment on CPSD or its successor. The amendment will become enforceable by the Commission under this General Order on the thirtieth day following publication of the notice of filing in the Commission's *Daily Calendar* (or successor publication). In its filing of any amendment, the Committee shall reference this General Order and request publication of the notice of the filing in the Commission's *Daily Calendar* (or any successor publication). In the case of any amendments, the Executive Director will make the appropriate codification revisions to the appendices to this General Order.
- 15.8 Duration of Standards. When the Committee ceases to exist pursuant to Public Utilities Code § 761.3(b)(3), the Standards, as on file with the Commission on the date the Committee ceases to exist, will remain effective and enforceable by the Commission under this General Order. The Commission thereafter may amend the Standards in a rulemaking proceeding and enforce the Standards as amended, all in exercise of its responsibilities under the California Constitution, the Public Utility Code, and this General Order.
- 15.9 Extension of Time. For good cause shown, a Generating Asset Owner may request the extension of any deadline established in or pursuant to this General Order. The request must be in writing and submitted in advance of the deadline to the Executive Director or the Executive Director's designee. Pursuant to the request, the Executive Director may grant one or more extensions, if the Executive Director determines that a good and sufficient reason exists for the extension. The extension will specifically indicate its duration.
- 15.10 Guidance. The Executive Director may promulgate forms, instructions, advisories, and other guidance to Generating Asset Owners aiding them in achieving compliance with this General Order.
- 15.11 Severability. If a court of competent jurisdiction determines that any provision of this General Order is void or unenforceable, the Commission will continue to enforce the remainder of the General Order without reference to the void or unenforceable provision.
- 15.12 Effective Date. This General Order is effective on the thirtieth day following the mailing of the Commission's decision adopting this General Order.

APPENDIX A: GENERAL DUTY STANDARDS

Adopted June 3, 2003 by the
California Electricity Generation Facilities Standards Committee

Pursuant to California Public Utilities Code § 761.3, each facility used for the generation of electricity owned by an electrical corporation or located in California (Facility) shall be operated and maintained by its owner(s) and operator(s) in accordance with the following standards:

1. Each Facility shall be operated and maintained in a safe, reliable and efficient manner that reasonably protects the public health and safety of California residents, businesses, employees, and the community.
2. Each Facility shall be operated and maintained so as to be reasonably available to meet the demand for electricity, and promote electric supply system reliability, in a manner consistent with prudent industry practice.
3. Each Facility shall comply with the protocols of the California Independent System Operator for the scheduling of powerplant outages.
4. No Facility shall be operated and maintained in a manner such that its output is scheduled, delivered, adjusted or withheld: (a) for the purpose of unfairly, unjustly or unreasonably influencing wholesale electricity generation prices established by the Federal Energy Regulatory Commission, (b) by falsely declaring that a Facility has been forced out of service or otherwise become unavailable, or (c) by failing to comply with the must-offer conditions of a participating generator agreement.
5. Each Facility shall maintain reasonable logs of operations and maintenance in a manner consistent with prudent industry practice.
6. Each Facility shall be operated and maintained in a reasonable and prudent manner consistent with industry standards while satisfying the legislative finding that each facility is an essential facility providing a critical and essential good to the California public.

Pursuant to California Public Utilities Code § 761.3(a), the California Public Utilities Commission shall implement and enforce these General Duty Standards for Operation and Maintenance. Pursuant to the provisions of California Public Utilities Code § 761.3(f), nothing in these General Duty Standards for Operations and Maintenance shall modify, delay, or

abrogate any deadline, standard, rule or regulation that is adopted by a federal, state, or local agency for the purposes of protecting public health or the environment, including, but not limited to, any requirements imposed by the California State Air Resources Board, an air pollution control district, or an air quality management district pursuant to Division 26 (commencing with Section 39000) of the California Health and Safety Code.

These General Duty Standards for Operation and Maintenance apply to all facilities used for the generation of electric energy owned by an electrical corporation or located in California with the following exceptions (see California Public Utilities Code §§ 761.3(d) and 761.3(h)):

1. Nuclear powered generating facilities that are federally regulated and subject to standards developed by the Nuclear Regulatory Commission, and that participate as members of the Institute of Nuclear Power Operations.
2. Qualifying small power production facilities or qualifying cogeneration facilities within the meaning of §§ 201 and 210 of Title 11 of the federal Public Utility Regulatory Policies Act of 1978 (16 U.S.C. Secs. 796(17), 796(18), and 824a-3), and the regulations adopted pursuant to those sections by the Federal Energy Regulatory Commission (18 C.F.R. Secs. 292.101 to 292.602, inclusive).
3. Generation units installed, operated, and maintained at a customer site, exclusively to serve that customer's load.
4. Facilities owned by a local publicly owned electric utility as defined in California Public Utilities Code § 9604(d).
5. Any public agency that may generate electricity incidental to the provision of water or wastewater treatment.
6. Facilities owned by a city and county operating as a public utility, furnishing electric service as provided in California Public Utilities Code § 10001.

(END OF APPENDIX A)

APPENDIX B: GENERATOR LOGBOOK STANDARDS (THERMAL ENERGY) [RESERVED]

**[Upon approval of the draft decision on
thermal energy logbook standards,
the operative provisions of the order
will be codified here.]**

APPENDIX C: GENERATOR MAINTENANCE STANDARDS

**[Upon approval of the General Order,
the Maintenance Standards,
as filed with the Commission on
May 16, 2003, will be codified here.]**

APPENDIX D: GENERATOR OPERATIONAL STANDARDS [RESERVED]

APPENDIX E: FINES FOR SPECIFIED VIOLATIONS

VIOLATION	FINE
Failure to file an Initial Certification, Recertification, or Notice of Material change at the time or in the manner required by this General Order.	\$1,000 per incident <i>plus</i> \$500 per day for the first ten calendar days the filing was late and \$500 for each day thereafter.
Failure to maintain logbooks as required by this General Order.	\$5,000 per incident.
Failure to respond to an Information Requirement set forth in section 10.0 of this General Order.	\$1,000 per incident <i>plus</i> \$500 per day for the first ten calendar days the Information Requirement was not satisfied after being requested and \$1,000 for each day thereafter.
Negligent submission of inaccurate information in response to an information request under section 10.0 of this General Order.	\$2,000 per incident <i>plus</i> \$500 per day for the first ten days the inaccuracy was not corrected and \$1,000 for each day thereafter.
Repeated violation of any requirement listed in this schedule.	200% of the fine that would be imposed for a first-time violation.

END OF GENERAL ORDER

**Attachment B:
Commission Responses to Comments on
Draft General Order Dated October 2, 2003**

Participants in the proceeding were provided an opportunity to comment on the draft General Order (GO) dated October 2, 2003. The following are the Commission's responses to the comments. The responses use, for identification purposes, the section number from the October 2, 2003, General Order. If the section number has been changed in the revised GO attached to this decision, the new section number is indicated in parenthesis.

1.0 Purpose

The participants offered mainly jurisdictional comments, suggesting that the cited authority does not support the functions to be undertaken under the GO, especially as that authority pertains to EWGs. To the contrary, the language of section 1.0 invokes both the specific authority given the Commission under SBX2 39 and the more general authority granted under state and federal law. The Commission's jurisdiction over EWGs has been discussed in more detail in the Part C of the decision and in the Commission's logbook (thermal electric) decision. The Commission's authority to enforce outage coordination protocols is addressed in response to the comments to section 9.0, *infra*. Other minor errors in the text have been corrected.

2.6 "Exigent Circumstance"

The comments suggested that the phrase "including but not limited to" is vague and creates uncertainty. The comment has been accepted and the language has been changed.

2.7 "General Duty Standards"

A participant commented that any amendments to the standards should be preceded by notice and reasonable opportunities to comment. The Commission has no authority over the Committee's procedures in amending any of the standards. To the extent the Commission amends the standards pursuant to section 15.8 of the GO, the Commission's normal procedures will be followed; and section 15.8 has been changed to reflect this understanding.

2.8 [Exemptions to "Generating Asset"]

Pursuant to comments, this section has been amended to reflect the exemption language set forth in SBX2 39. The enforcement of standards against hydroelectric facilities is discussed in Part C of the decision.

One issue, raised by the comments, is the application of the standards to Generating Assets, located outside of California, that produce electricity used in California. Since this is a rulemaking proceeding, it is premature to determine the applicability of the GO to situations that are fact-specific. Nonetheless, we also note that, consistent with the discussion in the Logbook Thermal [draft] decision, we do not categorically exempt all out-of-state facilities or those owned by more than one entity. Further, we limit implementation and enforcement to covered electric generation facilities within California and generally those out-of-state facilities owned or operated by PG&E, SCE and SDG&E.

2.9 “Generating Asset Owner”

Some comments indicated that too many persons or entities, such as shareholders and employees, were included in the original definition of “Generating Asset Owner.” The third sentence has been deleted although the Commission will enforce the GO against any person or entity (with the exception of governmental agencies) owning, operating, or managing a Generating Asset. The participants’ recommendations to exempt out-of-state facilities are discussed in response 2.8.2, *supra*.

2.12 “Generator Logbook Standards (Thermal Energy)”

One comment said that any amendments to the standards should be preceded by notice and reasonable opportunities to comment. This comment is discussed in response 2.7, *supra*.

2.13 “Generator Maintenance Standards”

A comment indicated that the Committee determined, on May 2, 2003, not to enforce assessment guidelines as enforceable standards. The comment is in error. The Committee, in its Resolution No. 2, decided that section 1 constitutes the Maintenance Standards. While the transcript of the Committee meeting includes some discussion between two committee members and staff concerning the differences between the standards and “assessment guidelines,” Resolution No. 2 as approved by the Committee does not differentiate between the standards and the assessment guidelines, both of which are contained in section 1.

Another comment suggested that any amendments to standards should be preceded by notice and reasonable opportunities to comment. This comment is discussed in response 2.7, *supra*.

No change has been made to this subsection.

2.15 “Material Change” (Now “Initial Certification”)

Several entities commented on the breadth of this definition and the unintended consequences that might follow if applied to changes involving Generating Assets. The concept of “material change” was used only in the context of changes to certifications and the reporting of previously undeclared deficiencies, pursuant to section 15.1. Because of this limited usage, the definition has been deleted here and section 15.1 has likewise been modified.

Section 2.15 now is a definition for “Initial Certification;” *see* response 7.2.4, *infra*.

2.17 “Notify CPSD” etc.

A comment suggested the use of “submit” and “submission” instead of “file” and “filing” as these latter terms may be confused with the formal filing of documents with the Commission’s Docket Office. An additional clarifying sentence has been added to indicate that these documents are not filed with the Docket Office.

Another comment suggested that fax or e-mail filing also be required. Section 15.2 authorizes CPSD to require electronic submissions of all filings.

2.19 Scheduling Coordinator

Several comments objected to covering scheduling coordinators. We believe the existing definition of “Generating Asset Owner,” response 2.9, *supra*, specifies the appropriate persons to be covered by this GO; thus, this subsection has been deleted. We do not determine at this time whether scheduling coordinators, under certain circumstances, may be Generating Asset Owners.

2.20 “SLIC” (Now 2.19)

A comment suggested citing to the appropriate ISO documentation that describes the “Scheduling Logging for the ISO of California” or “SLIC.” Because SLIC is described on the CASIO website, and the Internet address may change over time, a citation has not been added to the definition. A description of SLIC, however, may be found at www.caiso.com under “Stakeholder Processes.”

2.21 “Standards” (Now 2.20)

One comment was that the second sentence concerning the obligation of Generating Asset Owners to comply with the ISO’s outage coordination protocol was redundant and confusing. The subsection has been modified in response to the suggestion. Other comments concerning the Commission’s authority to enforce ISO tariffs and protocols are discussed in response 9.0, *infra*, and in Part E(1)(e) of the decision.

2.22 “Thermal Energy” (Now 2.21)

One comment suggested that “is not limited to” makes the definition ambiguous. We have made the language more precise.

3.0 Required Compliance

Comments were submitted indicating that, because of the breadth of the original “Generating Asset Owner” definition, employees and other persons would be brought under the GO. As indicated previously, the definition of “Generating Asset Owner,” subsection 2.9, has been narrowed; and this comment has been addressed by similarly narrowing the persons required to comply.

4.0 General Duty Standards

Comment stated that the General Duty Standards are vague, they may conflict with other standards, and the enforcement of General Duty Standards 3 or 4 will encroach on FERC’s regulatory authority. Another comment about how this section conflicts with subsection 2.9 has been addressed by the amended “Generating Asset Owner” definition.

The Commission is obligated and authorized to implement and enforce operations and Maintenance Standards adopted by the Committee, including the General Duty Standards. Concerns about the content of the General Duty Standards were raised before and resolved by the Committee. Jurisdictional issues concerning the ISO are discussed in response 9.0, *infra*. Language has been added to this section to address any perceived discrepancy between the General Duty Standards and other standards.

5.0 Generator Logbook Standards (Thermal Energy)

Some comments argued that exemption authority cannot be delegated to staff, the criteria for granting exemptions is not stated, and generators should have the ability to request exemptions.

In anticipation of the Commission adopting the draft Interim Opinion Regarding Commission Implementation and Enforcement of Logbook Standards for Thermal Powerplants (filed October 29, 2003), conforming changes have been made to section 5.0, including changes based on comments on that draft decision. Further changes, if any, to the final adopted Interim Order Regarding Logbook Standards for Thermal Powerplants will be incorporated in the final version of section 5.0.

7.1 Applicability of [Maintenance] Standards

A comment asserted that the GO adopts a strict liability standard that will be inflexible in adapting to differences among Generating Assets. As noted in Part D of the decision, a strict liability standard is a tort standard not commonly used to describe administrative

enforcement. The GO requires adherence to the standards and other obligations set forth therein, and this obligation exists whether or not the generators intended a violation or was negligence or reckless. The standards themselves, however, allow generators considerable flexibility in developing maintenance plans to meet those standards. The GO also provides that sanctions for violations may be enhanced or mitigated depending on the factual circumstances surrounding the violation.

7.2.1 Content of Maintenance Plans

One comment was that the GO does not adopt the compliance mechanism originally set forth in the Maintenance Standards. This decision explains that the Commission has authority under SBX2 39 to adopt the enforcement methods for the standards. The Commission has considered all of the Committee's enforcement recommendations and adopted many of them. Ultimately, the Commission will rely on its prior enforcement experience to fashion an implementation and enforcement mechanism that will be workable.

Other comments concerned the definition of Generating Asset Owner, addressed in response 2.9, *supra*, and the application of the GO to out-of-state plants, discussed in response 2.8, *supra*.

7.2.2 Certificate of Compliance

One comment was that the definition of Generating Asset Owner could include thousands of persons. This comment has been addressed in response 2.9, *supra*.

7.2.3 Certificate of Noncompliance

One entity suggested that "corrective plan" should be defined. This section sufficiently addresses the purpose and content of such a plan. Other comments asked for a procedure allowing generators to demonstrate why compliance with certain standards should be waived. This is unnecessary since the standards allow considerable flexibility in attaining compliance, and the generators themselves will prepare the maintenance plans for their Generating Assets. Some participants also asked for more time than 180 days to comply.

The Committee finalized the Maintenance Standards on May 2, 2003; thus, generators have had considerable time already to begin bringing their programs into compliance. Subsection 15.9 has been amended to authorize the Executive Director to allow more than one 30-day exemption; but such extensions will be allowed sparingly.

7.2.4 Time of Filing

One participant suggested that “Initial Certification” be defined. A definition has been provided in a revised subsection 2.15. Other comments concerning the definition of “Generating Asset Owner” and extensions of time have been previously addressed.

7.2.5 Time of Filing for Other Assets

Another comment was that the definition of Generating Asset Owner could include thousands of persons. This comment has been addressed in subsection 2.9, *supra*.

7.3.1 Method of Recertification (Now Recertification of Maintenance Plans, 7.3)

One comment was that the definition of Generating Asset Owner could include thousands of persons. This comment has been addressed in response 2.9, *supra*.

The text has been slightly modified for the reason given in response 7.3.2, *infra*.

One participant requested clarification on what documents need to be verified; this request has been addressed in a change to subsection 15.3, *infra*.

7.3.2 Time for Recertification (Now Deleted)

One suggestion was that a three-year cycle be used for recertification since this interval would reduce the regulatory burden and coincide with normal inspection and overhaul periods. Another comment was that the definition of Generating Asset Owner could include thousands of persons. This comment has been addressed in response 2.9, *supra*.

This section has been deleted, however, for the following reason. Once all standards and logbook requirements are enforced under this GO, generators will be required to periodically submit recertifications or similar documents indicating they remain in compliance. Thus, a new subsection 15.1 has been added to the GO addressing the ongoing reporting obligations of generators concerning logbooks and Maintenance Standards.

7.5 Exemption

The main body of the decision addresses comments about delegating authority to the Executive Director to exempt Generating Assets from certain requirements of the standards based on the best use of the Commission’s limited resources in maximizing the program’s benefits of improving electric service reliability and adequacy. *See* Part E(1)(a). This subsection of the GO has been slightly modified to remove any ambiguity resulting from the use of “other factors.” Assets exempt under this subsection are not exempt for all purposes of the GO. While certain Generating Assets may be exempt from

subsections 7.2, 7.3, or 7.4 of the GO, the remaining provisions of the GO (unless otherwise indicated) do apply to all Generating Assets as defined in subsection 2.9.

Some comments asked that the exemption process be more explicitly defined. The Commission does not anticipate a case-by-case exemption process so such procedural details are unnecessary. Rather, the Executive Director is authorized to exempt categories of Generating Assets based on the objective criteria specified in the GO. The text has been modified accordingly.

Finally, one comment asked that CPSD be required to provide generators with feedback concerning their certified and recertified maintenance plans. The Commission does not have the financial resources to provide such an evaluation to all generators. Resources permitting, CPSD is available to answer questions from generators about the development of their plans and certifications.

9.0 Independent System Operator (ISO) Outage Coordination Protocol

Many comments were submitted on the respective jurisdictions of the Commission, CAISO, and FERC, especially in the context of CAISO's outage coordination protocol. These concerns are addressed in Part E(1)(e) of the decision. The Commission's enforcement of the CAISO outage coordination protocol is to ensure the proper operation and maintenance of electric generating facilities, a responsibility imposed on the Commission by section 761.3 and recognized under federal law.

10.1 Provision of Information

The parties filed various comments: the subsection is too broad; it ignores a statutory exemption for EWGs (Pub. Util. Code § 216(g)); the five-day response period is too short; and the Commission cannot require the submission of information in a format different from how it is normally maintained.

No changes are necessary to this subsection. The scope of information that the Commission may request includes seven specific categories of information as well as other materials "reasonably related to the requirements of this General Order." The scope of information that may be requested is sufficiently circumscribed.

The section 216(g) issue is addressed in the Commission's Thermal Logbook Standards decision. While section 216(g) does indicate that EWGs are not public utilities under the Commission's general ratesetting jurisdiction, SBX2 39 specifically enlarges Commission authority, "[n]otwithstanding subdivision (g) of section 216," to enforce maintenance and operations standards for all electric generation facilities owned by electrical corporations. EWGs, while they may not be public utilities under the general ratesetting provisions of the Public Utilities Code, are electrical corporations subject to section 761.3 and are public utilities under specific provisions of the state constitution. *See* Cal. Const. art. XII, § 3.

The five-day response period is retained because, in some instances, the requested information may be lost or destroyed if not promptly acquired. Generators remain free to request a deadline extension under subsection 15.9 of the GO.

Finally, since the Commission has broad authority under Pub. Util. Code § 792 to specify the books and accounting practices of public utilities, the Commission also has the authority to specify how information will be submitted to staff. The Commission has specified the submission format in many previous proceedings. For all generators, the authority to require the submission of information in a format readily usable by staff is reasonably implicit in section 761.3(a)'s charge to "implement and enforce standards."

See the discussion under response 10.5, *infra*, explaining the reason for other changes to this subsection.

10.2 Authorization for Release of Information

Some comments suggested that this subsection seeks to indirectly extend the Commission's ability to obtain information the Commission is not authorized to obtain directly. Other participants are concerned that the Commission may obtain and subsequently release information that is held in confidence by another governmental agency.

In its mandate to the Commission to "implement and enforce standards," the Legislature implicitly provided us with the authority to gather necessary information concerning the maintenance and operation of Generating Assets. The Commission is authorized to obtain this relevant information directly from the generators; however, in some circumstances, information held by other agencies will be more helpful to the Commission's enforcement purposes. For example, generators submit generation data to NERC. While the Commission can obtain the raw data directly from the generators, the Commission's ability to satisfy its section 761.3 obligations is enhanced if staff can obtain the information from NERC and thereby benefit from that organization's sophisticated analytical tools. Similarly, the Commission can obtain accident data from generators; but the files maintained by other public safety agencies may include interviews, photos, and other information helpful to staff in determining whether the maintenance or operation of a Generating Asset may have contributed to an accident.

The confidentiality concerns expressed in some comments are addressed in response 15.4, *infra*.

10.3.2 Submission of Information to NERC

Some comments questioned the Commission authority to require generators to submit information to NERC. These concerns are addressed in subsection 10.2, *supra*.

One participant pointed out that NERC does not accept information from wind generators and asks how this subsection will be applied for such generators. The subsection is slightly modified to alleviate this concern.

10.3.3 Transitional Compliance Period

One entity suggested the vagueness of “transitional” and “regular.” This language is slightly modified. Other participants’ concerns about the Commission’s authority to require the submission of information to NERC have been addressed in response 10.2, *supra*.

10.3.4 Frequency of Information (Now “Historical Information”)

Several participants indicated that this subsection requires generators to submit duplicative information with little benefit to the Commission. In response to these comments, the subsection has been eliminated. A substitute subsection, “Historical Information” has been provided authorizing CPSD to request historical generating information for any period after January 1, 1998.

10.4 Provision of Information to ISO (Now Deleted)

Comments were received saying that the requirement interferes with federal jurisdiction and the provision is duplicative of subsection 9.1. Part C of the decision addresses the jurisdictional concerns and they need not be repeated here. As the subsection duplicates the earlier provision, it is deleted.

10.5 Books, Accounts, Papers, and Other Documents (Now Deleted)

Many of the comments on this subsection repeat concerns raised earlier to subsection 10.1. Upon review, the two subsections are sufficiently related and should be combined. This consolidated helps address the participants’ concerns about the breadth of subsection 10.5. Other comments concerning the provision of information are discussed in response 10.1, *supra*.

One entity suggested a new subsection allowing information disputes to be referred to an Administrative Law Judge. The Commission’s Resolution ALJ-164 (Sept. 16, 1992) limits the resolution of discovery disputes to formal proceedings. The suggestion is not feasible under the existing rules.

10.6 Safety Related Incidents (Now 10.4)

Safety-related accidents may indicate defects in facility operations and maintenance that may affect electrical system reliability and adequacy. The critical components of plant systems range in cost from a few to millions of dollars. Some parties recommended a higher damage-reporting threshold, and we have now established a \$50,000 threshold.

This threshold still represents a conservative effort to monitor threats to electrical system reliability caused by failures of relatively inexpensive equipment. The meaning of “significant media coverage” is clarified, but other terms such as “damage” have been retained since they are sufficiently precise. For safety-related accidents, the short 24-hour notification requirement (which may be by phone), followed by a 5-day period for written reports, is preferable since these requirements allow Commission staff to investigate incidents while memories are fresh and the accident site is relatively unchanged.

11.1 General Requirement [Audits, Inspections, and Investigations]

The comments raised questions about Commission investigative authority over EWGs and concerns about potential interference with plant operations resulting from frequent inspections. The jurisdictional issues have been raised and addressed earlier in Part C of the decision. The Commission’s obligation under section 761.3(a) to implement and enforce standards certainly includes the authority to conduct audits, inspections, and investigations related to the scope of this legislation. The Commission’s authority exists under section 761.3(a), notwithstanding other provisions of the Public Utilities Code that may exempt EWGs from other public utility ratemaking requirements.

Commission staff has already received extensive training in preparation for audit and inspection activities. Through classes and ongoing training, staff will have the expertise to conduct well-planned audits and inspections while minimizing interference with generators. A generator’s obligation to cooperate includes affording access to Generating Assets.

11.2 Interviews and Testimony

Participants questioned whether sworn testimony can be compelled outside of a formal Commission proceeding. They also criticized the lack of any Commission procedure to quash subpoenas or seek protective orders. Pub. Util. Code § 311(a) recognizes the authority of individual Commissioners, the Executive Director, and assistant executive directors to “administer oaths . . . and issue subpoenas for the attendance of witnesses and the production of papers . . . and testimony in any inquiry, investigation, hearing, or proceeding” This authority is not limited to information requested in formal proceedings or from regulated entities. *See also* Pub. Util. Code § 314. The GO does not prevent any person from seeking to quash or limit a subpoena or an information request through other legal means. The section has not been changed.

11.3 Audits, Tests, or Technical Evaluations (Now “Tests and Technical Evaluations”)

The comments questioned who bears the costs and liabilities resulting from tests and technical evaluations. The comments also raised the problem of how tests and technical evaluations may interfere with CAISO’s schedule of power and power outages.

Commission staff will not be operating Generating Assets during tests or technical evaluations. The language has been modified to indicate that, upon Commission staff's request, the Generating Asset Owner or a third person mutually agreed upon by the Generating Asset Owner and staff will conduct any test or evaluation. Additional language has been added requiring the generator to notify CAISO of such tests or evaluations if they may affect power scheduling. Commission staff will carefully schedule tests or evaluations to minimize generation disruptions and will, as appropriate, coordinate its activities with CAISO.

Other entities recommended advance notice of tests and evaluations and a formal procedure, before the Commission's law and motion judge, for disputes about these tests and evaluations. In some cases, advance notice would negate the value of a particular test or evaluation. The Commission's law and motion procedure is now limited by Resolution ALJ-164 (Sept. 16, 1992) to formal proceedings and the procedure is not available in these situations. Once again, the GO does not prevent a Generating Asset Owner from seeking to quash or limit a subpoena or an information request through other legal means.

11.4 Preservation of Records

Several participants complained of what they characterized as the burdensome nature of the proposed "life of the asset plus three years" retention period. The retention period has been changed to five years. One comment asked that the requirement be prospective and generators should not be required to retain records maintained by a previous owner. In its present form, the section is prospective in that the effective date of the GO will commence a five-year retention period for all referenced documents in existence at that time, including any relevant records that were transferred from a prior owner.

11.5 Third-Party Audits, Tests, or Technical Evaluations

The comments argued that CPSD should not be the final arbiter of what tests or evaluations should be performed. The participants may have missed the purpose of this subsection. This provision affords generators an opportunity, during an audit, inspection, test, or evaluation, to submit the results of a previously prepared audit or test that may address some or all of the pending information requests. The generator is not required to submit these results, unless specifically requested by CPSD; but if they are submitted, CPSD will determine how useful the submitted information is to the pending inquiry. If adequate information is already available, the subsection may reduce a generator's costs and minimize the interference with its operations.

12.0 Violations

Some entities commented that the section imposes strict liability for what may be inconsequential violations and that enforcement should be more focused on reckless or

deliberate violations or violations that threaten grid reliability. One participant was concerned that a series of minor violations may lead to “negligence per se” findings by a civil court. Other comments urged that notice and an opportunity to cure, and other due process opportunities, be provided before a violation is deemed to occur.

As explained in Part D of the decision, strict liability is a tort concept not commonly used to describe administrative enforcement. The GO does require adherence to the standards or other obligations set forth therein, and this obligation exists whether or not the generator intended a violation or was negligent or reckless. This is common in many administrative regulatory schemes (*e.g.*, water pollution discharges). Section 14 of the GO, however, sets forth a variety of circumstances that may mitigate or enhance a sanction, such as the seriousness of the violation, subsection 14.3.2 (now subsection 14.1.3), or the degree of compliance with guidelines concerning the standards, subsection 14.4.1 (now subsection 14.2.1). In the event of a violation, sections 13.0 and 14.0 provide detailed procedures that are fully compatible with due process. The Commission cannot second-guess how a civil court might interpret repeated violations of the GO in tort suits against generators since such litigation is fact-intensive. For ensuring electric system reliability and adequacy, which is the Commission’s present concern in implementing section 761.3, a series of cumulative minor violations may well result in significantly diminished generation or more outages.

12.2 Retaliation

The comments were that this section exceeds Commission jurisdiction and the text gives no indication how causation between a violation and retaliatory action will be determined. In implementing and enforcing the standards, the Commission is well within its authority under section 761.3 to prevent retaliatory action against persons who report violations to the Commission. The GO authorizes formal proceedings in section 13.0 to determine whether retaliation has occurred. The subsection has been modified, however, to incorporate specific language suggested by one participant.

13.1 Formal Enforcement Proceedings

Several participants questioned Commission jurisdiction to conduct formal proceedings against EWGs for violations of the GO. Once again, section 761.3(a) instructs the Commission to implement and enforce the standards, “notwithstanding” any exemptions provided under Pub. Util. Code §§ 216, 228.5(c) & (d). Another comment was that the Commission has failed to pursue FERC authority to enforce these standards through Participating Generator Agreements. In the decision, the Commission asks its Executive Director to study further how, as a regulatory backstop, the standards can also be enforced through CAISO tariffs. *See* Ordering Paragraph No. 4.

13.3.1 Specified Violations

Many comments were submitted questioning whether CPSD has the authority to impose scheduled fines. Other comments suggested that the reduction of scheduled fines when warranted, as well as waivers when curing the violation would not be feasible or economic.

The comments miss the following point: Specified fines can be imposed for a limited set of violations, but they can be imposed only if the Generating Asset Owner agrees. If the owner agrees, the matter can be expeditiously resolved. The value of this simplified enforcement process is diminished if the Commission must determine whether mitigating circumstances exist in particular circumstances. If the Generating Asset Owner disputes that there was a violation or asserts that some mitigating circumstances should be weighed, the owner can refuse the offer of a scheduled fine and wait for formal proceedings to be commenced.

Because scheduled fines cannot be imposed unless the Generating Asset Owner agrees, there is no delegation of authority or due process problem.

13.3.2 Schedule of Fines

Several comments suggested that advance notice and an opportunity to be heard should be given before the schedule of fines for specified violations is modified by resolution. These suggestions have been incorporated into the section.

13.3.3 Acceptance of Assessed Fine

One participant suggested a mechanism for reducing scheduled fines by a settlement, presumably with staff. By allowing for negotiation of fines, this suggestion would defeat the purpose of the scheduled fine process to expedite the resolution of this type of violations.

The subsection has been modified to clarify that the imposition of scheduled fines only occurs upon the generator's consent. The subsection has also been amended to include interest on delinquent fines.

13.3.4 Contest of Scheduled Fine

Some comments were that the 10-day challenge period is too short. In response, the contest period has been extended to 30 days.

Other comments suggested that generators will be deprived of due process or penalized if they do not accept the assessment of a scheduled fine under subsection 13.3.1. To the contrary, the specified violation/scheduled fine process does not violate due process if the generator contests the proposed assessment. If a generator believes it has a meritorious

defense to an alleged violation, the generator can choose to defend itself in any subsequent formal proceeding before the Commission during which it will have a full array of procedural rights. As the result of a formal proceeding, the generator may be vindicated or, even if a violation is determined, the resulting sanction may be less than would have been imposed under the specified violation/scheduled fine process. The specified violation/scheduled fine process does not prejudice the generator.

13.4 Other Remedies (Now 13.5)

For the reason discussed in response 14.2, *infra*, this section has been renumbered.

14.1 Violation (Now Deleted)

Some comments indicated that “other applicable law” is too vague and general. Another comment was that this subsection repeats subsection 13.1 and should be deleted. In response to the latter suggestion, the subsection has been omitted.

14.2 Punishment of Contempt (Now 13.4)

Some participants questioned the Commission’s authority to impose sanctions against EWGs. This argument subsection repeats provisions of the Public Utilities Code; its inclusion in the GO helps generators, some of whom have not been regulated by the Commission, to understand the range of formal proceedings employed by the Commission. Since this subsection relates to “Commission Proceedings,” it has been moved to subsection 13.4 of the GO.

14.3 Sanctions (Now 14.1)

One comment questioned the Commission’s jurisdiction over EWGs, a concern that has been addressed earlier. Another entity commented that some of the mitigating factors set forth in *In re Standards of Conduct*, D.98-12-075, 84 CPUC 2^d 155 (1998), have not been included. Two factors, the overall public interest and the role of precedent, have been added to the language.

14.3.1 [Diligence and Reasonableness] (Now 14.1.1)

One entity commented that it would be difficult to determine whether a generator acted reasonably in not reporting an incident to a governmental agency other than the Commission. The Commission disagrees; the facts and circumstances surrounding a failure to report can be demonstrated in a specific enforcement proceeding.

14.3.4 [Financial Resources] (Now 14.1.4)

One comment questioned the Commission’s ability to evaluate EWGs’ financial information. The Commission has over 90 years of experience in reviewing the financial

information of a wide range of commercial entities. EWGs' financial information presents no special interpretative problem.

Another comment questioned the Commission's authority to impose punitive damages. The Commission's authority to weigh a generator's financial resources has been established by prior Commission decisions. *See* D.98-12-075, *supra*. Any constitutional limits on the Commission's authority to impose sanctions based on an entity's financial information will be based on the facts and circumstances of a specific enforcement proceeding.

14.4 Mitigation of Sanctions (Now 14.2)

Another entity commented that some of the mitigating factors set forth in *In re Standards of Conduct*, D.98-12-075, 84 CPUC 2^d 155 (1998), have not been included. They have been added to subsection 14.3 (now subsection 14.1).

14.4.1 [Guidelines] (Now 14.2.1)

One comment was that CPSD does not have authority to issue guidelines to generators. A new subsection 15.10 has been added, pursuant to Pub. Util. Code § 308, authorizing the Executive Director to issue forms, instructions, advisories, and other guidance to further the implementation of this program. As discussed in Part E(1)(a) of the decision, the Commission believes that responsibilities involving the exercise of actual judgment and discretion can be lawfully delegated to the Executive Director.

14.4.2 [Conflicting Requirements] (Now 14.2.2)

Some entities commented that the GO's acknowledgement that there are inconsistent requirements indicates impermissible regulatory overlap. Other entities objected to the possibility of multiple fines being imposed by different agencies. Another entity indicated that such overlapping requirements would discourage new investment in California.

In our complex society, regulations and jurisdiction may overlap and result in enforcement actions by separate agencies. Federal, state, and local taxation of a person's income may be the most prominent example. The purpose of this subsection 14.4.2 (now subsection 14.2.2) is to provide a basis for generators to seek a mitigated fine based on any overlapping requirements. The subsection allows for penalties to be reduced in such a circumstance. Concerning any investment disincentive, no facts in the record reasonably support this conclusion. To the contrary, the specificity of the operation and Maintenance Standards may produce more regulatory stability and electrical system reliability, circumstances that are attractive both for energy investors and investors the much larger non-energy component of California's \$1.3 trillion economy.

14.4.3 [Penalties Imposed by Other Agencies] (Now 14.2.3)

One comment was that the Commission should avoid, rather than mitigate, regulatory conflicts. This comment has been addressed in response 14.4.2, *supra*.

14.2.4 [Demonstrated Compliance] (New)

To better mirror the list of enhancing factors, an additional mitigating factor, demonstrated cooperation with the Commission, has been added as a new subsection.

14.5 Enhancement of Sanctions (Now 14.3)

One comment was that the mitigating and enhancing sections are too limited. As described above, the relevant mitigating factors set forth in *In re Standards of Conduct*, D.98-12-075, 84 CPUC ^{2d} 155 (1998), have been added to subsection 14.1.

14.5.1 Compliance with Guidelines (Now 14.3.1)

One comment was that CPSD does not have authority to issue guidelines to generators. As indicated previously (subsection 14.4.1, now subsection 14.2.1), a new subsection 15.10 has been added authorizing the Executive Director to issue forms, instructions, advisories, and other guidance to assist generators in complying with the GO. This subsection 14.5.1 (now subsection 14.3.1) allows compliance with Executive Director-issued guidance to be considered as one mitigating factor in imposing a sanction against a generator.

14.5.3 Outages (Now 14.3.3)

One comment was that unsafe conditions on the transmission grid sometimes result in generator outages; and, in such cases, generators should not be punished. While sanctions for violations that result in reduced power or outages may be enhanced under this provision, the Commission, applying subsection 14.1.5, will also consider mitigating circumstances, such as the situation described in the comment.

14.5.5 [Efforts to Impede or Frustrate CPSD] (Now 14.3.5)

One entity commented that sanctions should not be enhanced when a generator asserts its legal rights. The text has been changed to clarify that a generator's lawful and reasonable invocation of legal rights does not itself provide a basis for enhancing a sanction.

14.6 Not Applicable to Specified Fines (Now 14.4)

Several comments recommended deleting this subsection because it impermissibly allows CPSD to further penalize a generator. The comments apparently miss the point of this subsection. The entirety of section 14.0 applies to sanctions imposed as the result of

formal proceedings before the Commission. This subsection simply clarifies that the mitigating and enhancing factors, that are available in formal proceedings, do not apply to scheduled fines imposed for specified violations under subsection 13.3.

15.1 Notice of Material Change (Now 15.1.2)

Some comments indicated that this provision duplicates an earlier section. Other comments were that the time period for giving notice is too short and the reporting period should run from discovery of the change. Most of these comments have been addressed in deleting the original language in subsection 2.15. The 30-day period is a reasonable accommodation between giving generators enough time to respond and providing the Commission with information it needs to ensure that Generating Assets are being properly maintained and operated.

15.1.1 Periodic Recertifications (New)

As discussed in response 7.3.2, a new subsection 15.1 has been added to govern the ongoing reporting obligations of generators in all program areas.

15.2 Filings and Submissions

One comment suggested that “file” and “filing” have specific meanings in the Commission’s formal proceedings and the use of these terms here may be confusing. The text has been slightly altered, but this subsection is sufficiently clear that the specified documents are delivered directly to CPSD and not to the Commission’s Docket Office. By analogy, advice letters are commonly filed with the Commission’s Industry Divisions with minimal confusion. This concern has also been addressed in response 2.17, *supra*.

15.3 Oath, Affirmation or Verification

Several comments suggested that this verification process would be burdensome if required for all documents that might be submitted to the Commission in the enforcement of standards. The text has been modified to limit the specific verification requirements to Certifications, Recertifications, Notices, or contests. By submitting any other document to the Commission, a Generating Asset Owner conducts business with the Commission and agrees, pursuant to Rule 1, “Code of Ethics,” RULES OF PRACTICE AND PROCEDURE, “never to mislead the Commission or its staff by an artifice or false statement of fact or law.”

15.4 Confidentiality

The comments presented a range of concerns about the confidentially procedures of the GO. They indicated that the provisions are inconsistent with a leading California case,

Bridgestone/Firestone, Inc. v. Superior Court,³⁷ because these requirements place only a modest burden on CPSD and a heavy burden on generators. The generators also indicated that the procedures under this subsection are cumbersome. They suggested that some information, if not protected, would be used by other persons to manipulate energy markets.

The *Bridgestone/Firestone* case sets forth a three-part process for determining confidentiality, *i.e.*, assertion of privilege, showing of need, assessment of whether a protective order would be sufficient. The case arose in the context of litigation between two private parties and does not mandate how confidentiality claims will be handled in a regulatory proceeding instituted by a constitutionally created regulatory agency. The court of appeals' decision supports our approach in subsection 15.4 in that: (a) the party asserting the privilege has the burden of establishing its existence; (b) a balancing of interests test may be used; and (c) confidentiality will not be maintained if fraud or an injustice would result. These three features are incorporated into this subsection and apply to claims not based on a specific statute.

One comment suggested that the confidentiality process might be simplified if categories of information could be presumptively considered confidential or not confidential. During the comment period on this decision, we invite participants to identify categories of information relevant to the purposes of the GO that might, in advance, be deemed or presumed either confidential or *not* confidential.

Finally, while we will recognize valid confidentiality claims, we generally believe that transparency of information, rather than concealment, is the most viable long-term strategy for preventing market manipulation.

15.5 Violations of Law

Participants argued that this subsection violates the provisions of GO No. 66-C, concerning public information, and Pub. Util. Code § 583. Other comments requested that the subsection be changed to require the Commission to notify the generator if confidential information will be released to another governmental entity.

If in conflict with GO No. 66-C, this subsection will prevail since it is more recent and is adopted specifically to assist the implementation and enforcement of section 761.3. Section 583 is not applicable since it pertains to the release of information for public inspection. This subsection only addresses the release of information to other governmental agencies for law enforcement purposes. Even if section 583 applied, it only requires that information furnished by a public utility be made public only pursuant to a Commission order. By adopting this GO, we determine that confidentiality claims for information indicating a possible violation of law will not prevent the submission of

³⁷ 7 Cal. App. 4th 1384 (1st Dist. 1992).

that information to other government agencies. This interpretation is consistent with other provisions of California law, such as Evidence Code § 1060, that do not extend the trade secret privilege to information that conceals fraud or otherwise works an injustice.

15.7 Committee Amendments

Several entities asked for an opportunity to comment on the enforcement of newly filed standards before the Commission enforces them. They also asked for additional time before the standards become enforceable.

Interested persons are likely to have an opportunity to comment on proposed amendments when the Committee first considers the proposals. The amendments would be to standards and requirements previously considered and adopted by the Committee and, through this GO, implemented and enforced by the Commission. The parties have had numerous opportunities in this proceeding to comment on the basic approach for enforcing these standards and requirements. Additional comments on implementation and enforcement methods previously approved are unlikely to provide any new useful information. If certain amendments present unique implementation and enforcement issues, we will entertain motions to permit comments on implementation and enforcement.

The effective enforcement date, however, has been extended to 30 days. Subsequent extensions may be requested under subsection 15.9.

15.8 Duration of Standards

In Part E(1)(g) of the decision, we discuss our authority, in certain circumstances, to amend the standards and requirements themselves. The text of this subsection has been modified to indicate that any such amendments will occur in a Commission rulemaking proceeding.

15.9 Extension of Time

Several comments were submitted indicating that one extension was unduly restrictive and additional time might be necessary under some circumstances. The subsection has been changed to allow one or more extensions based on the circumstances.

15.10 Guidance (New)

A new subsection has been added authorizing the Executive Director to issue forms, instructions, advisories, and other guidance to assist generators in complying with the GO. *See* response 14.5.1, *supra*. Such delegation is permissible under Pub. Util. Code § 308.

Appendix E: Fines for Specified Violations

Several comments recommended deleting the fine for negligent submission of inaccurate information. This scheduled fine process is designed for violations where few if any facts are in dispute. If a Generating Asset Owner agrees that it negligently failed to submit correct information, the generator should have the opportunity to accept a scheduled fine for that violation. If the Generating Asset Owner disputes that it was negligent, the generator should contest the assessment and seek vindication in a formal Commission proceeding.

Other comments suggested that “incident” is vague and may lead to multiple assessments for essentially the same behavior, *e.g.*, multiple, similar incorrect log entries in the same logbook. The term “incident” is not defined since the Commission cannot foresee all the possible factual circumstances that may arise. Commission staff will apply these specified fine provisions reasonably for the simple reason that these fines cannot be imposed without the generator’s concurrence.

Another entity maintained that a hearing should be held before these fines are imposed. Such a proposal defeats the expeditious, consensual purpose of these provisions. If a Generating Asset Owner wants a hearing, the generator should wait for a formal proceeding to be commenced.

**Attachment C:
Participants Submitting Comments on
Draft General Order Dated October 2, 2003**

AES Alamitos, LLC;
AES Huntington Beach, LLC;
AES Redondo Beach, LLC
Automated Power Exchange, Inc.
Cabrillo Power I, LLC
Cabrillo Power II, LLC
Duke Energy North America
Elk Hills Power, LLC
FPL Energy, LLC
High Desert Power Project, LLC
Independent Energy Producers Association
Long Beach Generation, LLC
Midway-Sunset Cogeneration Company
Mirant Delta, LLC;
Mirant Potrero, LLC
Pacific Gas & Electric Co.
Reliance Energy Mandalay, Inc.
Reliant Energy Coolwater, Inc.
Reliant Energy Ellwood, Inc.
Reliant Energy Ettwanda, Inc.
Reliant Energy Ormond Beach, Inc.
San Diego Gas & Electric Co.
Southern California Edison
West Coast Power: El Segundo Power, LLC
Western Power Trading Forum